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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----:
:
SONY MUSIC ENTERTAINMENT, et al.,:
Plaintiffs, :
:
-vs- : Case No. 1:18-cv-950
:
COX COMMUNICATIONS, INC., et al.,:
Defendants. :
:
-----:

VOLUME 11 (P.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

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1 A F T E R N O O N S E S S I O N

2 NOTE: The December 17, 2019, afternoon portion of
3 the case begins in the absence of the jury as follows:

4 JURY OUT

5 THE COURT: Ready for the jury?

6 MR. ZEBRAK: Yes, Your Honor.

7 THE COURT: Okay. Joe, let's get our jury, please.

8 NOTE: At this point, the jury returns to the
9 courtroom; whereupon, the case continues as follows:

10 JURY IN

11 THE COURT: All right. Please have a seat.

12 Mr. Zebrak, please continue, sir.

13 MR. ZEBRAK: Thank you, Your Honor.

14 CHRISTIAN D. TREGILLIS, DEFENDANTS' WITNESS,

15 PREVIOUSLY SWORN, RESUMED

16 CROSS-EXAMINATION (Cont'd.)

17 BY MR. ZEBRAK:

18 Q. Good afternoon, Mr. Tregillis.

19 A. Hi.

20 Q. Do you recall that just before the lunch break, we were
21 talking about your damages calculations?

22 A. I think it was an analysis of economic harm; that's
23 right.

24 Q. With respect to your analysis of economic harm, you
25 multiplied the infringement notices times a royalty rate,

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1 correct?

2 A. Right. The revenue share that would go to the
3 plaintiffs, a dollar.

4 Q. Okay. So before lunch, we already talked about what you
5 used for the quantity. I'd like to now talk about the royalty
6 rate that you applied. Okay?

7 A. Okay. Great.

8 Q. Now, you used a dollar per notice, right?

9 A. Right.

10 Q. Okay. And you used the dollar because that was your
11 calculation, sort of the average cost of a single-track
12 download from iTunes, correct?

13 A. Not exactly. A single-track download from iTunes is
14 somewhere between \$0.79 and \$1.29. In production, you and
15 your clients provided information that told me how much of
16 that you get, and for sound recordings, you get up to about
17 \$0.90, and for musical compositions, you get \$0.10. So I used
18 all of that, assuming you get all of the musical compositions
19 and all sound recordings, even though those -- that's not
20 actually the case, but that's where those come from, is your
21 disclosures.

22 Q. All right. The activity for which that rate applied was
23 the single-track download for digital download from iTunes,
24 correct?

25 A. It's based on the \$0.79 up to a \$1.29 for a single-track

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1 download, that's right.

2 Q. Right. And you looked to the single-track download rate
3 because you understood that these tracks were available for
4 purchase on an individual basis on iTunes, correct?

5 A. Right.

6 Q. Now, in choosing a royalty rate, it's true, is it not,
7 sir, that it's important that the royalty rate fit the
8 economic realities of the situation that you're applying it
9 toward, correct?

10 A. Yes.

11 Q. And the single-track download rate when someone buys a
12 track from iTunes, that's the rate for obtaining the track for
13 personal use, correct?

14 A. Yes.

15 Q. That price is not the price for authorization to
16 distribute it to countless people through a peer-to-peer
17 network, correct?

18 A. That's right. It's for an individual to purchase and use
19 that track. That's my understanding of it.

20 Q. Right. And it's also your understanding, sir, that
21 plaintiffs have never granted a license for anyone to
22 distribute their music all across peer-to-peer networks on an
23 unlimited basis, correct?

24 A. That's right.

25 Q. The cost of that would be enormous, correct?

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1 A. I don't think so in this situation for the fact -- like
2 you just described, the economic realities of this, what's
3 happening here, which I talked about somewhat in my direct --

4 Q. So --

5 A. -- I don't think -- I don't think it would call for an
6 enormous rate at all.

7 I think my rate is appropriate.

8 Q. All right. Well, again, we just reviewed, your rate is
9 the rate for, for the activity of someone buying a
10 single-track download for their own personal use, right?
11 That's what we talked about?

12 A. That's right. That's what I was able to observe is that
13 rate.

14 Q. Right. I understand.

15 I'd like to run through a few of your slides with
16 you, sir.

17 Mr. Duval, would you please call it up on the
18 screen, beginning with slide 20? Next slide, please. Thank
19 you.

20 Now, is this a slide that you participated in the
21 preparation of?

22 A. I did it all myself actually.

23 Q. So this is the rate you used, right?

24 A. It's the basis for the rate. I used the rate that's
25 reflected in the \$0.90 and \$0.10 over to the right on the

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1 bottom.

2 Q. Right. But it's for this activity of somebody making a
3 lawful purchase of that single digital download, right?

4 A. Exactly, yeah, through Channel 1 is what I tried to call
5 it.

6 Q. Right. For their personal use, correct?

7 A. Right.

8 Q. Now, during your direct testimony, I think you said this
9 case is about Cox's policy, right? That was your wording?

10 A. That's my understanding. That's right.

11 Q. Right. Well, the unlawful uploading and downloading --
12 well, sir, do you have an understanding that the uploading and
13 downloading of plaintiffs' music on peer-to-peer to unlawful?

14 A. That's my understanding.

15 Q. All right. And so the situation we're talking about in
16 this case is your analysis of situation 1, but, sir, this is
17 what we're referring to as what this case is really about is
18 this unlawful BitTorrent activity. That's slide 2 here,
19 right? Do you see that?

20 A. Yeah, yeah. Channel 2 was the way I referred to it, or
21 Path 2, I guess you could call it.

22 Q. Right.

23 Could you, Mr. Duval, jump to slide 5, please?

24 You recall this slide, right? This is another slide
25 you prepared?

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1 A. I didn't prepare this one. This is, like I said, sort of
2 above my graphics level.

3 Q. Okay. So -- now this slide, right, this is here that all
4 these dots and lines, this is the peer-to-peer network, right,
5 showing all the users and the music flying around, right?

6 A. That's the idea, right. That's what it was intended.

7 Q. Right. And now you call -- this slide, it says Transfer
8 of a Single File.

9 Do you see that?

10 A. Yes.

11 Q. Now, each time a music file goes from, let's say, this
12 person to this person and then this person gives it to him and
13 he gives another copy to this person and, you know, it's just
14 like wildfire, you know, that involves copying, doesn't it?

15 A. That's my understanding, right.

16 Q. Right.

17 A. For purpose of my analysis, that's what I understand
18 happens in a peer-to-peer network. I think it can be pieces
19 of files, but ultimately the files -- pieces are assembled at
20 each location, and then the file exists at that place in an
21 unlawful and unauthorized way.

22 Q. Right. And you understand people go to these networks to
23 obtain for free what they otherwise would pay for when they're
24 viewing this unlawful download, correct?

25 A. I'm not expressing an opinion on that, but I think I

1 heard your argument that it's heavily focused in peer-to-peer
2 networks, that a lot of the content is unauthorized.

3 Q. Now -- and again, the rate you used is -- let's say this
4 is iTunes right here, which would be the cost for this one Cox
5 subscriber to get the one download that you attribute to the
6 notice, right? Yes or no, sir?

7 A. No, I think you're misinterpreting what's reflected on
8 the slide. First, you're drawing the arrow in the wrong
9 direction, so this implies that the person would be sending it
10 to Cox.

11 What I intended to express is the computer in the
12 middle is getting it -- getting pieces from Cox and the
13 others, so that's what I tried to depict.

14 Q. And I apologize, my question was a little imprecise since
15 you're depicting a peer-to-peer network here.

16 A. I tried.

17 Q. My point was a simple one, which is when someone buys a
18 single-track download from iTunes, they get, we've already
19 talked about, that one copy for their personal use, right?

20 A. Right. It's not like peer-to-peer, getting it in pieces
21 along this network. You just buy it individually from iTunes,
22 and they send it to you, and you pay \$1.29, and the plaintiffs
23 get their piece of that. That's right.

24 Q. Now, I'm famous at home for my lousy handwriting. It's
25 even worse with these little boards.

1 But let's say this is the Cox subscriber here.

2 Okay?

3 A. Okay.

4 Q. And they get it from somebody else on the peer-to-peer
5 network. Now, this subscriber starts sending it in all
6 different directions, and just so the jury is not confused,
7 all those distributions, you didn't calculate any amount for
8 that because data doesn't exist for that, correct?

9 A. No, that's not right. It's for different reasons.

10 Q. Well, you calculated your economic harm based on the
11 infringement notices we talked about, right?

12 A. That's right, but that's not -- that's not the reason for
13 not counting those downloads you're talking about.

14 Q. Well, you didn't attribute an amount for distributions to
15 others around the network because you didn't have data for
16 that. It doesn't exist.

17 A. You basically just asked the same question, and I'll give
18 you the same answer. It's true I did not calculate a value
19 for additional downloads. It's not because the data aren't
20 available. It's because economically I don't think it's
21 appropriate.

22 Q. Well --

23 A. Would you like me to explain why?

24 THE COURT: No. Wait for the next question, sir.

25 BY MR. ZEBRAK:

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1 Q. Yeah. So you don't take issue with the concept that the
2 music industry is entitled to be paid when somebody obtains a
3 copy of their work, do you?

4 A. No.

5 Q. Okay. And just at a high level, you calculated a rate
6 for a person getting a track from iTunes compared to the --
7 multiplied that against the infringement notices, correct?

8 A. Right. It's not just the notices. It's the track
9 notices. So if an infringement notice has five tracks on it,
10 then they get a dollar for each of the tracks that is covered
11 by a copyright.

12 Q. Right. And it is your understanding, sir -- I know
13 you're not a technical expert, correct?

14 A. Right.

15 Q. And you're not providing legal testimony here today
16 either, correct?

17 A. Also correct.

18 Q. So you do know, at least have the basic understanding, I
19 assume, that when MarkMonitor sends an infringement notice to
20 Cox, it's because MarkMonitor observed the Cox customer on a
21 peer-to-peer network, reporting that they were sharing a known
22 infringing file?

23 A. That's consistent generally with my understanding.

24 Q. Right.

25 A. It was available for sharing on that day at that

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1 location.

2 Q. Right.

3 A. And you're right, I did have to have a working
4 understanding to do my analysis.

5 Q. Sure. Right. But nobody has information about the
6 number of different times that Cox subscriber that was
7 observed on that date sharing a known infringing file gave it
8 to other people. That data doesn't exist. You don't have
9 access to that, correct? It's a yes-or-no question, if you
10 can answer it.

11 A. I can't exactly answer it in a yes-or-no way. I'm really
12 close to agreeing with you, but I -- I'm almost there, so I
13 can't quite answer it in a yes-or-no way as you ask it.

14 Q. Well, let's try having you look at a specific example.
15 That might be more assistive. Okay?

16 A. Okay.

17 MR. ZEBRAK: Let's look at slide 28, Mr. Duval.

18 BY MR. ZEBRAK:

19 Q. Do you remember this slide?

20 A. Yes.

21 MR. ZEBRAK: Now, Mr. Duval, could you highlight the
22 bottom five rows?

23 BY MR. ZEBRAK:

24 Q. First of all, Mr. Tregillis, do you see the column that
25 says "ICOMS"?

1 It's the fourth one in.

2 A. Yes.

3 Q. You understand that to be a unique reference to a Cox
4 subscriber, correct?

5 A. Right, exactly.

6 Q. Okay. And am I correct, sir, that this data that you
7 have here shows that three different Cox subscribers were
8 observed engaging in file sharing with respect to this file
9 that Cox reported to -- that MarkMonitor reported to Cox,
10 correct?

11 A. Close. It's four. There's -- the first four lines all
12 represent unique --

13 Q. Thank you.

14 A. -- ICOMS IDs.

15 Q. Thank you.

16 A. And one of them, the last one, it's appearing five times,
17 so it's four unique individual.

18 Q. Right. I appreciate the clarification. Thank you.

19 So here we're seeing that in the bottom five rows,
20 that's one, that's one unique Cox subscriber there, right, by
21 the ICOMS number?

22 A. Exactly. You can see this all throughout October of
23 2014.

24 Q. Sure.

25 A. You can see it, I think, five times on that one computer

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1 and then three times on other computers.

2 Q. Right. And you understand that a songwriter wrote this
3 song?

4 A. That's my understanding.

5 Q. And an artist performed this song?

6 A. Right. In this case, there's a sound recording, not a
7 musical composition, so --

8 Q. Okay.

9 A. -- I think it covers, as I understand it, that recording
10 by Jamiroquai.

11 Q. And October 1, 2014, MarkMonitor sends an infringement
12 notice to Cox -- or, excuse me, infringement detected
13 October 1; and October 2, MarkMonitor sends an infringement
14 notice to Cox about this Cox subscriber. That's correct?
15 That's the first row?

16 A. That's what this means as I understand it, that's right,
17 from having spent time and looking at this data.

18 Q. Okay. And then 16 days later on the 17th, another
19 infringement notice is sent to Cox indicating that the same
20 Cox subscriber is still engaging in file sharing on the
21 peer-to-peer network for this recording, right?

22 A. Exactly.

23 Q. Okay.

24 A. See it -- see it five times actually.

25 Q. Right. And it happened not just on the, on the first two

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1 times, but really throughout the remainder of the month, there
2 were several more instances. You see that?

3 A. I do. I can see it, like I said, five times in that
4 month. There are none after that, but for that month, you can
5 see there are five times.

6 Q. And you have no idea about the extent to which other
7 individuals on a peer-to-peer network downloaded some or all
8 of this file from this Cox subscriber during that window of
9 time, correct?

10 A. Exactly. You're right.

11 MR. ZEBRAK: Right. Your Honor, no further
12 questions with this witness.

13 THE COURT: All right. Thank you.

14 Redirect?

15 REDIRECT EXAMINATION

16 BY MR. BUCHANAN:

17 Q. Good afternoon, Mr. Tregillis.

18 A. Hello.

19 Q. You were asked a couple questions about some prior
20 testimony in which you've testified as an expert but then the
21 ultimate testimony was not allowed by the Court. Do you
22 recall that?

23 A. Close. It was not all of my testimony that was not
24 allowed. There was a part that was not allowed in the two
25 cases, one in 2005, one in 2007.

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1 Q. Okay. And could you explain what happened in those cases
2 to the jury?

3 A. Sure. In the first one that Mr. Zebrak asked me about,
4 it's a case called Grupo Televisa; and in that case, there is
5 a, what's called a telenovela, or Mexican soap opera; and
6 there was a star who was at one place and moved to a
7 competitor; and there was a lawsuit; and it was about what was
8 the value of losing that star from Televisa and having him go
9 somewhere else; and in that case, I used a survey; and the
10 judge concluded that that survey wasn't reliable.

11 So as a result, because I couldn't use that survey,
12 I wasn't allowed to testify about anything that used that
13 survey. There was other parts I could testify about, but
14 there was a determination that that didn't provide a solid
15 foundation.

16 And the second case really was very similar. It was
17 a case for what's called The Sugar Association against the
18 makers of a product called Splenda; and in that case, it was
19 related to a tagline called "Made from sugar, so it tastes
20 like sugar"; and the sugar people said it's not made from
21 sugar, so you shouldn't be able to say that on the packages.

22 And in that case, I looked at a survey that the
23 Splenda people had used and done to quantify the value of the
24 harm relating to that use of that tagline; and the judge said
25 it was okay to use it for part of the analysis, for the

1 packets, not okay to use it when you use Splenda like in a
2 Coke can; and so again, the judge said, you can't use that
3 survey, so any part of that survey for value of Splenda in
4 Coke cans, can't talk about that part.

5 So again, in both cases, it was a piece of evidence
6 that I couldn't use; and so anything that used that evidence,
7 I couldn't testify about.

8 Q. And how many times have you testified in court?

9 A. Forty-nine, I think it is. It might be 50 here today. I
10 don't know.

11 Q. And those are the only two examples where your testimony
12 was somewhat limited?

13 A. For anything like that. There have been times,
14 procedural issues, like in this case even, there are
15 situations where there are certain things that I can and can't
16 testify about, but, but similar to what you've talked about,
17 no, those are the only two.

18 Q. Okay. I think you testified that it's not necessary to
19 factor in the potential impact of uploads. Why is that?

20 A. Because if you have a peer-to-peer network that has many,
21 many, many copies of a file available for people on that
22 peer-to-peer network to copy and then you say, if you add or
23 remove a Cox subscriber from a supply of many, many files that
24 are identical, there is no indication that there would be any
25 more or fewer downloads.

1 MR. ZEBRAK: Objection, Your Honor. Lack of
2 foundation. He doesn't understand the extent of the
3 infringement. It's pure speculation.

4 THE COURT: Sustained.

5 Ask your next question.

6 BY MR. BUCHANAN:

7 Q. Okay. You were asked questions about the value of a
8 license to distribute, and I think Mr. Zebrak said: Why do
9 you think -- why do you think a rate -- or he said: Isn't a
10 rate for a license to distribute, wouldn't that be enormous?

11 I think you said no. Do you recall that?

12 A. Yes.

13 Q. Okay. And could you elaborate? You weren't given the
14 chance to elaborate. Could you elaborate on that?

15 A. Yes. It is because of a lack of evidence that the
16 plaintiffs would have gotten more downloads if the Cox
17 subscriber was or was not on the network.

18 Q. Okay. And could you explain why you were unable to
19 answer Mr. Zebrak's question about the availability of data of
20 other downloads?

21 A. It's really the same idea. The reason that I did not
22 perform an analysis that included value on downloads is due to
23 a lack of evidence that in a world in which Cox behaved
24 differently, there would be more downloads to go to the
25 plaintiffs. It's a necessary part of a calculation of

1 economic harm, and there's not -- and that's it.

2 MR. BUCHANAN: Okay. Thank you. No further
3 questions.

4 MR. ZEBRAK: Your Honor, one question.

5 THE COURT: No. No, we're done. Thank you.

6 Your testimony is complete. Thank you, sir.

7 THE WITNESS: Thank you.

8 THE COURT: Have a good afternoon.

9 THE WITNESS: Thank you.

10 NOTE: The witness stood down.

11 MR. ELKIN: Your Honor, may we have a very brief
12 sidebar to cover some matters?

13 THE COURT: Certainly.

14 NOTE: A sidebar discussion is had between the Court
15 and counsel out of the hearing of the jury as follows:

16 AT SIDEBAR

17 MR. ELKIN: Thank you, Your Honor.

18 THE COURT: Yes, sir.

19 MR. ELKIN: We are about to rest. I just wanted to
20 take up a couple little matters not in the presence of the
21 jury.

22 THE COURT: Did you want to make your Rule 50 motion
23 now or --

24 MR. ELKIN: Yes. I do have my Rule 50 motion,
25 which --

1 THE COURT: Do you want to give them -- do you want
2 me to excuse the jury, give them 15 minutes, and we'll --
3 where are we going after your preliminary?

4 MR. ELKIN: I just wanted to make a, just make a
5 brief, quick proffer regarding the sound recordings and music
6 publishing, if I can, with regard to the, what's in the
7 record.

8 THE COURT: Yes, sir.

9 MR. ELKIN: I'll be quick about it.

10 THE COURT: No, that's fine.

11 MR. ELKIN: So this is based on the exhibits that
12 Your Honor provisionally admitted subject to their review.

13 THE COURT: This is the 7,200?

14 MR. ELKIN: Yes. So with regard to -- so I have two
15 examples, two exemplars. One is the sound recordings, and one
16 is the publishing.

17 So what you have here under Plaintiff's Exhibit
18 4281, this is a sound recording for -- the title is "Dookie,"
19 Green Day, which is a -- covered by a separate registration,
20 and it has nine different sound recordings on it, and there is
21 another -- yes, so this is with regard to the -- this is --
22 all of these tracks, Your Honor, are actually part of the
23 works in issue in the case.

24 THE COURT: All right.

25 MR. ELKIN: And then with regard to -- I can hand

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1 this out to, to Your Honor.

2 THE COURT: Thank you.

3 MR. ELKIN: Then with regard to the publishing
4 example of that, and this is Plaintiff's Exhibit 369, this
5 is -- the title of the work is Chris Brown, "I Can Transform
6 Ya," and this is a music composition.

7 And there is in the case under Plaintiff's Exhibit
8 1833 a sound recording which is owned by Sony Music which has
9 the Chris Brown song "I Can Transform Ya." So I wanted to
10 hand that up for consideration.

11 THE COURT: Are these exhibits admitted previously
12 or we'll consider that in a minute?

13 MR. ELKIN: They were provisionally --

14 THE COURT: These are part of the 7,200
15 registrations?

16 MR. OPPENHEIM: It's part of the 7,200 registrations
17 that we'll file something on after we review them posttrial.

18 MR. ELKIN: I just wanted to make the proffer, Your
19 Honor, before we rest.

20 THE COURT: Okay.

21 MR. ELKIN: That was the only purpose of this.

22 MR. OPPENHEIM: Can we --

23 MR. ELKIN: I'm not trying to sandbag anyone. I
24 just wanted to make sure, we understood Your Honor reserved
25 your decision on the issue from last night, and I wanted to

1 make sure that we at least got that in.

2 THE COURT: Okay.

3 MR. ELKIN: And then the other thing is with regard
4 to the Rule 50 motion, let me just cover the --

5 MR. OPPENHEIM: I'm sorry, can I just have a
6 question? Is this not --

7 MS. GOLINVEAUX: Yeah, cross that out.

8 MR. OPPENHEIM: Okay. Thank you. Sorry. Go ahead.

9 MR. ELKIN: That was a holdover.

10 So there were six issues that we moved under: the
11 504(c) on derivative works; the 504(c) on compilations; on
12 direct infringement, both distribution and reproduction;
13 contributory, no material contribution; vicarious both as to
14 no direct financial interest and no ability to supervise; and
15 then finally, no direct infringement by business owners, sort
16 of keying off of the Cobbler case. Those are the --

17 THE COURT: Right. Do you want to preserve your --
18 by Rule 50, yes.

19 Do you want to respond?

20 MR. OPPENHEIM: We also would like to make a Rule 50
21 motion, Your Honor. If you want to excuse the jury, that's
22 fine, or I'll do it right now orally.

23 THE COURT: Yeah, go ahead. Do it now.

24 MR. OPPENHEIM: Your Honor, we believe that pursuant
25 to Rule 50, plaintiffs have demonstrated both their

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1 contributory and vicarious infringement claims such that a
2 reasonable jury couldn't rule otherwise. With respect to both
3 claims, the evidence that's been submitted of direct
4 infringement by Mr. Bahun and documentation that's been
5 submitted to the Court and supported by testimony by
6 Barbara Frederiksen-Cross was not subject to any reasonable
7 dispute as to -- as to the direct infringement that occurred
8 by Cox -- on Cox's network.

9 With respect to contributory infringement, of
10 course, the Court has already found knowledge, so the only
11 remaining element is material contribution. The testimony
12 unequivocally has shown that Cox provides a high-speed
13 network, routers, switches, and accounts, as well as anonymity
14 to all of their subscribers, and all of those easily meet the
15 very low threshold that's needed to demonstrate material
16 contribution.

17 On the issue of vicarious infringement, Your Honor,
18 the evidence on direct financial benefit has been clear. The
19 defendants do not dispute the documents that have come in that
20 shows that Cox makes -- has made decisions not to terminate
21 infringers because of a desire to collect money, and the
22 defendants do not dispute that Cox has collected monies from
23 subscribers who were known repeat infringers. We believe that
24 this easily fulfills the financial -- direct financial benefit
25 requirement.

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1 And that finally, with respect to right and ability
2 to supervise, obviously, the right is contained within each of
3 the AUPs both on the business side and on the residential
4 side, and the ability to terminate has been terminated by the
5 over 600,000 terminations that Cox has engaged in.

6 THE COURT: All right. I'm going to deny both of
7 the Rule 50 motions. I find there's issues of fact to the
8 plaintiffs on each of those issues. There may not be -- there
9 is some evidence on each of the issues, and they're not
10 undisputed. For instance, there's, you know, testimony by
11 experts about error rates, even though not significant, in the
12 MarkMonitor system, and also we have different theories on why
13 customers weren't terminated, and the jury has heard evidence
14 of that and they may consider that other than the economic
15 incentive. So your exception is noted.

16 Your -- yes, go ahead.

17 MR. ELKIN: No, thank you, Your Honor. I was just
18 going to say so with that, we -- defendants rest.

19 THE COURT: Okay.

20 MR. ELKIN: I did want to make a comment, if I
21 could, just in terms of the timing.

22 THE COURT: Yeah.

23 MR. ELKIN: I don't know the official scorecard in
24 terms of the timing. I think they're close to 34 hours, and
25 we're about a little shy of 30.7. So they're really edging up

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1 against what the Court at least provisionally assigned, and I
2 just wanted to inquire whether we were going to be still going
3 forward with the closings today.

4 THE COURT: Well, what's your plan for rebuttal?

5 MR. OPPENHEIM: I believe we'll call one witness. I
6 believe that his testimony will be relatively short. It will
7 be Dr. McGarty.

8 THE COURT: Okay.

9 MR. OPPENHEIM: I don't know how long the cross will
10 go. Obviously, that's not in my control.

11 THE COURT: Let's see how far we go. We need to
12 finalize instructions and the verdict form.

13 MR. OPPENHEIM: Right, obviously.

14 THE COURT: So I've heard from one juror that he or
15 she wants to leave here at 5:30 and they can't stay late, and
16 that may be an issue. So maybe -- let's see where we go with
17 the witness and how long it takes for us to finalize the jury
18 instructions and verdict form.

19 Mr. Buchanan?

20 MR. BUCHANAN: Yes, thank you, Your Honor. On
21 Dr. McGarty, I just want to know what area he's going to
22 testify on because you have a ruling about what he can and
23 can't testify to. So that might give us some guidance.

24 MR. OPPENHEIM: I think we went through this
25 yesterday, Your Honor. It's a rebuttal witness, and he'll be

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1 touching on some of the issues that have been presented during
2 defendants' case. I don't -- as I said yesterday, the
3 question of effectiveness we're not going to ask him to
4 testify to, and I don't believe he will. We instructed him
5 not to. But again, it should be short, Your Honor.

6 THE COURT: Well, that -- as a rebuttal witness,
7 we'll have 14 sidebars, as we did with today's witnesses. So
8 we'll see where we go. Let's just put it on and let's roll.

9 MR. OPPENHEIM: Can I ask one quick question?

10 THE COURT: Do you want to formally rest your case
11 before the jury?

12 MR. ELKIN: Sure. I'll be happy to do that.

13 MR. OPPENHEIM: Do you have a draft verdict form we
14 can look at while we're doing this? I'm not trying to rush
15 you.

16 THE COURT: Yeah. I don't because I've got a couple
17 of questions.

18 MR. OPPENHEIM: Okay.

19 THE COURT: I mean, it's essentially do you find by
20 a preponderance of the evidence that you've proven vicarious
21 and/or contributory infringement separately broke out?

22 And -- but a couple issues I want to address.

23 MR. OPPENHEIM: Very well.

24 THE COURT: Okay. Thank you.

25 MR. ELKIN: Thank you, Your Honor.

1 NOTE: The sidebar discussion is concluded;
2 whereupon, the case continues before the jury as follows:
3 BEFORE THE JURY

4 MR. ELKIN: Your Honor, defendants rest.

5 THE COURT: All right. Thank you, Mr. Elkin.

6 All right. Rebuttal testimony?

7 MR. ZEBRAK: Yes, Your Honor. Plaintiffs are
8 calling Dr. Terrence McGarty.

9 THE COURT: Okay.

10 MR. ZEBRAK: Please come up, sir.

11 THE COURT: Either way is fine.

12 TERRENCE PATRICK McGARTY, JR., PH.D.,

13 PLAINTIFFS' WITNESS, SWORN

14 THE COURT: Good afternoon, sir.

15 Please, Mr. Zebrak, go ahead.

16 MR. ZEBRAK: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. ZEBRAK:

19 Q. Good afternoon, Dr. McGarty.

20 A. Good afternoon.

21 Q. Can you hear me okay? I've been told I'm not speaking
22 loud enough into the microphone at times.

23 A. Am I speaking too loud?

24 Q. No. No, you're fine.

25 A. Okay.

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1 Q. Thank you.

2 Would you please state your full name for the
3 record.

4 A. My name is Terrence Patrick McGarty, Jr.

5 Q. And where do you work, sir?

6 A. I work at the Telmarc Group.

7 Q. And who retained you in this case?

8 A. I'm sorry?

9 Q. Why are you here today?

10 A. I'm testifying for the plaintiff.

11 Q. And what were you asked to do, at just a high level,
12 please?

13 A. At a high level, I was asked to do two tasks. One is to
14 provide insight and my knowledge about high-speed internet
15 access in IP, and the second was to examine the capabilities
16 of Cox's system to handle MarkMonitor tickets and the like.

17 Q. And let's start with some basic background. Would you
18 tell us your educational history, sir?

19 A. I went to college at Manhattan College in the Bronx. I
20 received a degree in electrical engineering. I then went on
21 to MIT, where I received a Ph.D. in Electrical Engineering and
22 Computer Science.

23 Q. And have you spent your career in a specific field?

24 A. My primary focus in my career has been
25 telecommunications. My first employment out of MIT was here

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1 in Washington at COMSAT.

2 Q. And what is COMSAT, sir?

3 A. COMSAT was Communications Satellite Corporation; and
4 there I was executive director of what was called Equipment
5 Integration Group; and Equipment Integration built network
6 monitoring, management, satellite launch control centers; and
7 amongst my many tasks, I got the opportunity to put the first
8 two international connections for the ARPANET up from Edam,
9 West Virginia; Trondheim, Norway; and to Goonhilly in the UK;
10 and they went up, I think, in 1975-'76.

11 Q. And just very briefly, what is ARPANET? I heard you
12 mention that a moment ago.

13 A. The ARPANET is the predecessor to the internet; and in
14 the mid-'70s, DARPA, which was Defense Advance Research
15 Project Agency, wanted to put together a computer network so
16 they could have multitasking computers; and the head of that
17 was a fellow by the name of Bob Kahn, who was subsequently
18 honored by the government for its efforts, and they started
19 out by putting these networks across the United States and
20 universities.

21 Bob came to me and said: Could we get outside of
22 the United States?

23 And like a good engineer, I said: Sure. We can do
24 anything.

25 And we went and did it.

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1 Q. And how long did you work at COMSAT, roughly?

2 A. About six years.

3 Q. And -- actually, I'd like to hand the witness a binder.

4 Could I have Dr. McGarty's binders? Well, we'll do that in a
5 moment.

6 A. Thank you, sir.

7 Q. You don't need to -- and could you look in that binder,
8 please, and --

9 A. Yes, sir.

10 Q. -- let me know if you see your CV in there?

11 It should be behind tab 1?

12 A. Yes, I am.

13 Q. And does that accurately reflect your education and work
14 history?

15 A. Yes, it does.

16 Q. Does it also include a list of publications and books and
17 work experiences?

18 A. Yes, it does.

19 MR. ZEBRAK: Your Honor, I'd move the admission of
20 PX 533.

21 THE COURT: Any objection?

22 MR. BUCHANAN: No objection.

23 THE COURT: It's received.

24 BY MR. ZEBRAK:

25 Q. Looking at your CV, I see you worked at Warner

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1 Communications. What was Warner Communications?

2 A. Warner Communications owned a subsidiary called Warner
3 Cable; and I initially started working at the Warner Cable
4 operation early 1980s, '80-'81, and then subsequently got
5 promoted to a group, president in charge of interactive
6 services, if you will; and so we were doing the first two-way
7 cable. We actually tried home shopping, home banking, home
8 travel. So it was the early days of cable, and we were doing
9 interactive cable services.

10 Q. And I also see on your CV that you spent some time at
11 NYNEX, now Verizon; is that right?

12 A. That's correct.

13 Q. And at a high level, could you tell the jury a little bit
14 about your role there?

15 A. Yeah. Two things I did at NYNEX. First, I was head of
16 R&D; and amongst R&D, one of my key responsibilities was
17 network management; and it was the first time that we
18 developed integrated network management.

19 I then became the chief operating officer of NYNEX
20 Mobile, which had become Verizon Wireless; and there I was
21 responsible for all operations, which included network
22 management, billing, customer service, etc.

23 Q. And you mentioned you're currently with Telmarc Group.
24 What is Telmarc?

25 A. Telmarc Group is something we formed back actually in the

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1 mid-'80s. We are a management and investment company. We
2 basically have done about 30 venture investments, some of
3 which I've actually run myself.

4 Q. And I see a reference on your CV to Zephyr
5 Telecommunications. What is that?

6 A. Zephyr Communications or Telecommunications was started
7 out as a voiceover IP company into Central Europe. We
8 expanded into a fiber backbone in countries from Russia,
9 Poland, Czech Republic, Slovakia, Romania, Hungary, Bulgaria,
10 about 15-20 countries; and we became the dominant fiber-based
11 IP company, providing both commercial and end user high-speed
12 ISP services.

13 Q. And you were the founder and CEO of that company; is that
14 correct?

15 A. I founded the company, and I was a CEO and chairman.

16 Q. And again, just at a high level, would you tell the jury
17 a little bit about your teaching experience?

18 A. I've held various positions after my Ph.D. I remained at
19 MIT until '75 on the faculty and research staff. I spent a
20 year at Columbia in the business school teaching
21 telecommunications, finance, and policy. At George Washington
22 University here, I taught various engineering courses, I was a
23 professor level; and then I also was at Polytechnic
24 University, which is now part of NYU, teaching
25 telecommunications policy.

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1 Q. And at a high level, could you characterize what your
2 publications generally involve that are listed on your CV?

3 A. My publications have been characterized as idiosyncratic.
4 They're all over the map. They range from guidance of
5 aircraft to data release, which I collaborate with a Russian
6 author on, and I've done a real wide swath. Most of them have
7 been in telecommunications, both in engineering and in policy.

8 Q. Thank you, Dr. McGarty.

9 Are you being compensated for your time on this
10 matter?

11 A. Yes, I am.

12 Q. On an hourly basis, is that correct?

13 A. That's correct.

14 Q. And what is your hourly rate?

15 A. \$700 an hour.

16 Q. And do your opinions, are they in any way dependent on
17 the substance of the opinions you provide?

18 A. Not at all.

19 Q. Strike that.

20 Your payment is not in any way contingent on your
21 opinions, correct?

22 A. That's correct.

23 Q. Thank you.

24 And likewise, I assume your payment in this matter
25 is not in any way contingent on the outcome of the matter?

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1 A. Right.

2 Q. And what are you currently doing with your time at
3 Telmarc?

4 A. For the last two years -- about two years ago, we stopped
5 doing investments, and now what -- I basically run Telmarc by
6 myself. It has become a philanthropic thing. I support
7 cancer research at Columbia Medical Center; and so I am
8 putting entrepreneurial teams, if you will, postdocs together;
9 and we're focusing on four or five different cancer areas.

10 MR. ZEBRAK: Your Honor, we would move the
11 admission -- excuse me. We would move to qualify Dr. McGarty
12 to testify as an expert in the design, implementation, and
13 operation of internet telecommunication networks, including
14 ISPs, and the operations of companies that use such networks.

15 THE COURT: Any objection?

16 MR. BUCHANAN: No, Your Honor.

17 THE COURT: All right. He's received for those
18 purposes.

19 BY MR. ZEBRAK:

20 Q. Dr. McGarty, were you able to reach a conclusion as to
21 your assignment concerning Cox's ability to receive, process,
22 and respond to copyright infringement notices?

23 A. Yes, I was.

24 Q. Just at a high level, so we're going to explore this in
25 more detail, could you tell the jury what your conclusion was

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1 there?

2 A. From my perspective as an operator, somebody who's done
3 the business and been responsible for it, and using that
4 background over the years, I came to basically two
5 conclusions, that -- one, that Cox's system has the capability
6 of processing MarkMonitor or other complaints, identifying the
7 customer, kept putting that information in a database and
8 tracking the number of complaints per customer over some
9 period of time.

10 My second observation is that the ability of that
11 system to reach an end result was problematic. They had
12 certain rules on the front end which limited the number of
13 complaints coming in; and on the back end, it was a, in my
14 opinion, a complicated process; and the biggest complication,
15 very simple terms, is ambiguity; and it said at 13 sets,
16 consider termination.

17 And one of the things I do as an operator is I try
18 to avoid ambiguity. You either do it or you don't. If you're
19 sailing a ship, you turn to the starboard or you don't.

20 So the ambiguity issue was a key issue in my view
21 with regards to the inability of the system to function
22 properly.

23 Q. And, Dr. McGarty, am I correct you're not here today to
24 testify as to what Cox should have done? Is that right?

25 A. I'm sorry?

1 Q. You're not here testifying as to what Cox should have
2 done?

3 A. Oh, no. What Cox should do is Cox's decision.

4 Q. Right. You're comparing Cox's capabilities to what it
5 actually did; is that correct?

6 A. That's correct.

7 Q. Okay. At a high level, because the jury's heard a bunch
8 about network management already, could you explain your, your
9 perspective on what network management is in the context of
10 ISPs?

11 A. Network management is something that I've lived with for
12 40 years and seen it evolve, so very simply, network
13 management is the ability to manage, control, monitor all of
14 the elements that go into providing the services to the
15 customer.

16 And there are three levels of network management
17 that I look on: performance, that is, is the network doing
18 what it's supposed to be doing in the right manner; quality,
19 is the customer getting the service they want. In cellular,
20 in the early days, there were dropped calls. We had to solve
21 the quality problem.

22 And then finally is the issue of compliance; and
23 compliance means that we live in an environment where there's
24 a lot of legal regulations; and having worked in 20 different
25 countries, I'm aware of them. You have to make sure that

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1 whatever the policies are are being complied with.

2 So those three elements focus on network management:
3 the quality, the performance, and the compliance.

4 Q. Again, at a high level, Dr. McGarty, would you tell the
5 jury what your understanding is of the technical
6 infrastructure that Cox relies on for delivering its internet
7 service to customers?

8 A. I'm sorry, could you --

9 Q. Sure. Could you briefly -- do you have an understanding
10 of Cox's -- the technical infrastructure that it needs to
11 provide internet service to its customers?

12 A. Yeah. Basically the Cox technical infrastructure is very
13 consistent with other current cable environments. For
14 high-speed internet, they connect to some backbone tier 1
15 carrier probably; and there's a lot of them out there now,
16 such as AT&T and Google and CenturyLink.

17 They then take those connections and, as I think
18 I've seen over the course of this trial, distribute them down
19 through routers eventually into the consumer and then modem.
20 And the consumers have a cable modem, a DOCSIS modem, if you
21 will, and that modem is the interface between the Cox network,
22 which is carrying the IP traffic, and the customer's premise
23 and their users. So it's a fairly simple, straightforward
24 system.

25 Q. Dr. McGarty, do you have an understanding of whether an

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1 ISP such as -- whether Cox, given its role in the internet
2 ecosystem, whether it would be providing internet service to
3 critical -- or likely be providing internet service to
4 critical infrastructure such as a large university hospital or
5 a military base?

6 MR. BUCHANAN: Yes, Your Honor, I'm going to object.
7 This is beyond the scope of his testimony.

8 THE COURT: Is that correct?

9 MR. BUCHANAN: Could we approach, Your Honor?

10 THE COURT: All right.

11 MR. BUCHANAN: I know --

12 NOTE: A sidebar discussion is had between the Court
13 and counsel out of the hearing of the jury as follows:

14 AT SIDEBAR

15 THE COURT: The question was, are you aware whether
16 Cox has subscribers who are hospitals? Is that it?

17 MR. ZEBRAK: That's the gist of it. With his
18 knowledge of the internet infrastructure, just by way of
19 understanding where this is headed is that large military
20 bases or large university hospitals wouldn't be receiving
21 their internet connection from an entity like Cox, and it's
22 direct rebuttal testimony to a lot of the testimony and themes
23 we've heard throughout.

24 And, you know, he --

25 THE COURT: He's run these networks all over the

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1 world.

2 MR. ZEBRAK: Yes, Your Honor.

3 THE COURT: So why don't you ask him instead not
4 about Cox, but ask him whether he's aware of how the military
5 installations use, develop their internet systems.

6 MR. ZEBRAK: Yes, sir.

7 THE COURT: Yes, sir.

8 MR. BUCHANAN: Your Honor, there is nothing about --
9 from this issue in any of his reports. We had an opening
10 report. He had a rebuttal report. He rebutted our experts.

11 He talked about business customers. I examined him
12 in his deposition. He didn't do a lot of work on the business
13 customer side, even, you know, made comments about, you know,
14 he would fire a guy if he cut off the service, like the
15 firemen's, and we think he's the son of a cop. And so he
16 offered no testimony.

17 Now he's coming in as an expert about the
18 connection? He was never offered. That's none of his
19 opinions. Even when he asked him what his opinions are, his
20 opinions have nothing to do with whether Cox can provide
21 internet service to a hospital. There's nothing there. And
22 so what's applied with me with the other witnesses should
23 apply to them.

24 MR. ZEBRAK: Quite frankly, I don't need -- if it's
25 permissible, Your Honor, I don't even need to ask in

1 relationship to Cox. I could just have him explain the
2 internet infrastructure, where there's actually three
3 internets. There's the internet, there's something called the
4 MILNET, and there's Internet2, which is what large military
5 bases and university hospitals are on. I don't need to tie it
6 to Cox.

7 THE COURT: And is that within the testimony of his
8 reports?

9 MR. ZEBRAK: Well, I mean, it's general background
10 on the internet infrastructure, which he testified in great
11 length about; and in his personal background, he actually
12 helped build Internet2, working --

13 MR. OPPENHEIM: But, Your Honor, as we have
14 discussed, he's a rebuttal witness. Cox has put forward --

15 THE COURT: Yeah, but it doesn't mean -- I mean --

16 MR. OPPENHEIM: No, I agree, Your Honor, he doesn't
17 get to do anything he wants; but Cox has put forward to the
18 jury that there's a critical infrastructure issue; and they've
19 done that, frankly, somewhat duplicitly, because the list of
20 business subscribers doesn't contain one of the fields which
21 indicates whether it's for WiFi or not. They have told the
22 jury this is military, this is hospitals.

23 And what Dr. McGarty will testify to is that's not
24 how the systems work. And he will describe -- he's sat on
25 presidential commissions involved in these kinds of things.

1 THE COURT: Yeah, yeah, yeah. I want to know
2 whether it's reasonable within the confines of what his
3 reports were about, that he would look at different
4 infrastructures and identify how the internet works in these
5 infrastructures.

6 MR. BUCHANAN: So in his reports, he has, like, five
7 pages of the network and infrastructure; and then he talks
8 about Cox's; and he says, just like he did there, their CATS
9 was fine. Then he went through step by step the policies and
10 how he believed that they didn't --

11 THE COURT: This witness?

12 MR. BUCHANAN: Yeah. That's what he did in his
13 reports. Then he had something on Procera, which they
14 dropped. He never offered an opinion. And we -- he knew
15 about the business customers.

16 I actually asked him, would you terminate a nursing
17 home? Would you terminate -- I don't know if I used hospital,
18 a military base, and he responded not with, hey, that that's
19 not relevant because they could never connect with any of
20 them. There's nothing in his report where he, he opines on
21 the ability of Cox's network to connect and provide service to
22 a military base or anything like that, zero.

23 THE COURT: All right.

24 MR. ZEBRAK: So respectfully, he explains the
25 internet infrastructure. He says: My role here is two-part.

1 One is to explain the background technology.

2 I admit he didn't delineate MILNET, Internet2,
3 internet. That issue was well out there --

4 MR. BUCHANAN: Oh --

5 MR. ZEBRAK: Excuse me, me sir. And he responded to
6 Mr. Buchanan's deposition questions not by saying it's an
7 irrelevant question, but by saying the same thing he said
8 here: I'm not here to dictate what Cox should have done.

9 It's just --

10 THE COURT: Okay. So he's not permitted to testify
11 about whether Cox and its internet system was capable or not
12 capable of operating in a military base or a hospital. You
13 can ask him the general infrastructure in a multiple-tier
14 system, and he can explain that. He's not going to tie it
15 into his testimony.

16 MR. ZEBRAK: I will do my best to avoid that. Thank
17 you.

18 NOTE: The sidebar discussion is concluded;
19 whereupon, the case continues before the jury as follows:

20 BEFORE THE JURY

21 THE COURT: Please proceed.

22 MR. ZEBRAK: Thank you, Your Honor.

23 BY MR. ZEBRAK:

24 Q. Dr. McGarty, I'm going to ask you some questions now just
25 about the background technology. I'm not asking you about,

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1 anything about Cox specifically, okay?

2 A. Yes, sir.

3 Q. Are you familiar with something called MILNET?

4 A. MILNET?

5 Q. Yes, sir.

6 A. MILNET was an offshoot of the ARPANET in the late 1980s,
7 and what happened is that MILNET was the DoD's private secure
8 version of the internet. What was left over became what we
9 now call the public internet.

10 And MILNET has evolved over time. It was under DCA,
11 Defense Communications Agency -- I think that's what it was --
12 and then it went into DISA. So it's now distributed amongst
13 DOD in various agencies. Homeland Security also has an
14 element of this secure network.

15 So it's, it's to some degree a separate network that
16 provides secure internet connections for DOD and other
17 entities.

18 Q. When you say "DOD," you're referring --

19 A. Department of Defense.

20 Q. Yes, sir. And are you familiar with something called
21 Internet2?

22 MR. BUCHANAN: Your Honor, I would just renew my
23 objection.

24 THE COURT: Yeah, overruled.

25 MR. BUCHANAN: In the report, there's nothing --

1 THE COURT: I've ruled.

2 MR. BUCHANAN: All right.

3 THE COURT: Your exception is noted.

4 Are you familiar with Internet2? Is that the
5 question?

6 MR. ZEBRAK: Yes, Your Honor.

7 THE WITNESS: May I answer?

8 THE COURT: Yes, sir.

9 BY MR. ZEBRAK:

10 Q. Yes, please.

11 A. Okay. Internet2 is a consortium of universities,
12 hospitals, and organization -- there's now more than a
13 thousand of them -- that have their own parallel internet
14 network. So for example, the three universities in Georgia:
15 Georgia Tech, University of Georgia, they're members of
16 Internet2. MIT, Harvard are members of Internet2.

17 I work with one of my partners, Mr. Hauser, and
18 together we did pro bono work connecting internet to, also to
19 hospitals and other facilities. I worked with the World Bank
20 and Institute of Peace.

21 So it's a separate internet parallel to the common
22 internet that universities and other types of organizations
23 join, and it provides them high-speed internet access at
24 substantially lower price, and most of these organizations now
25 participate in that effort.

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1 Q. Does the military run MILNET?

2 A. The military MILNET has evolved into multiple networks
3 within various DoD elements, but MILNET was the seed founder
4 in, I think, 1988 or '87. I was -- at that time, I was doing
5 things at NYNEX where we work with something called NYSERNet,
6 which was New York State's element that was -- became part of
7 Internet2. So there was a, actually a trifurcation occurring
8 at that time between commercial, Internet2, and the military.

9 Q. And just so there's no confusion, you said there's the
10 internet, Internet2, and MILNET, correct?

11 A. MILNET and its subsequent players.

12 Q. Three separate --

13 A. Three separate, different fibers, different connections,
14 and generally they do interconnect at certain levels, but the
15 point is security is a key point.

16 Q. Okay. Thank you, Dr. McGarty.

17 Dr. McGarty, turning back to the opinion that you
18 provided in this matter, could you elaborate on that a little
19 bit more, starting first with your opinion with respect to
20 Cox's actions versus capabilities on the residential side?

21 A. Well, Cox's technical capabilities were there. It was,
22 in my opinion, a fairly simple and straightforward system of
23 collecting e-mails, finding out who they were sent -- you
24 know, related to, IP address to customer, recording those
25 complaints in a database and then doing something about it.

1 So from the technical perspective, it was a fairly
2 simple and straightforward process.

3 Q. You mentioned front-end limits and back-end limits
4 before. Do you recall that?

5 A. Yeah. The front end, the front end is when they would
6 accept incoming complaints, all right; and Cox did throttle
7 some of the front-end complaints because there were certain
8 entities that were capable of putting in many more complaints
9 than Cox would accept. So therefore, there was a throttling
10 on the number of complaints that came in on that front end.

11 And if you follow the record, you can see that there
12 was a -- somewhat of a continual request to try to increase
13 that over a period of time; and, you know, in my opinion, the
14 system from a technical perspective could have easily handled
15 a substantially larger number of complaints. So it was not,
16 in my opinion, based upon my experience, a technical
17 bottleneck, because many of these systems are very scalable.

18 Q. What do you mean when you say the system is "scalable"?

19 A. You can add additional capacity and capability. You
20 could do cloud computing or a bunch of other things that would
21 allow you to handle a substantially larger number of incoming
22 complaints. So you were not technologically limited at the
23 front end, especially in this time frame which -- that we're
24 looking at.

25 At the back end, I think to follow up on your

1 question, there's an issue of policy, and Cox decides what
2 their policy is. I'm not here to tell anybody what they
3 should do. I'm just observing it.

4 And for a while, Cox did terminate people who had
5 multiple complaints, and then there was a period where they
6 ended up with -- having sat here, I've seen the various
7 descriptions of these complaints, and in various technicolor
8 of presentations, but basically it is that 13th complaint that
9 it says: Consider for termination.

10 Ambiguity, as I said earlier, is a serious problem.
11 You either terminate or you don't terminate. Do you terminate
12 on the 14th? Do you terminate on the 15th? I don't know, but
13 you gotta do something. Okay? It's -- you know, the ship is
14 going towards the shoals. Turn the wheel. All right? That's
15 the only thing I can think of.

16 And generally in my operations, I always try to
17 avoid ambiguity.

18 Q. Dr. McGarty, just a few more questions. You just spoke
19 to the residential side. Could you explain your analysis with
20 respect to the business side in terms of the customer base?

21 A. You want me to discuss the business side?

22 Q. Yeah. I mean, the observations you just made, was there
23 a limitation for Cox with respect to acting with respect to
24 its business subscribers?

25 A. My observations on the business side is that they

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1 apparently let most of the businesses just skate in terms of
2 these notices, and so they were much more lenient in my
3 observation with their business customers.

4 Q. Not necessarily with respect to copyright infringement
5 per se, but in running your various businesses, did you have
6 occasion to work with business customers on compliance issues?

7 A. In, in my European operations, probably 70 percent of my
8 business was business customers; and, you know, spanning
9 multiple countries in multiple legal environments, I had
10 probably as many lawyers as, as employees at this point
11 because every country had a different set of laws; and
12 compliance -- being compliant with the law is a very critical
13 factor.

14 So with the business customers, we typically entered
15 into contracts. There were the AUP-type things that went in
16 there that says: This is an acceptable use.

17 And each country had its own little changes in
18 acceptable use; and we managed to successfully navigate those
19 waters by having good contracts, good acceptable use policies.
20 We basically maintained our ability to verify that they were
21 being followed, and that went fairly well.

22 Q. Dr. McGarty, you were here when Dr. Almeroth testified
23 for Cox, correct?

24 A. Yes, sir.

25 Q. I'm not saying his words precisely, but do you recall

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1 when he said that he considered Cox's policy but didn't really
2 need to focus so much on Cox's implementation of the policy
3 when he compared it to the Copyright Alert System?

4 A. Yes, I do.

5 Q. Do you have a view about whether implementation of a
6 policy is important with respect to network management?

7 A. Implementation of the policy is critical. I mean, as the
8 CEO of the business, you've got the responsibility to make
9 sure that your company is being run compliant with all rules
10 and regulations. I can have a quality service, I can have the
11 lowest cost, but if I don't comply with laws, I'm in trouble.
12 And in some of the countries I operated in, I didn't want to
13 have a Borscht diet for the next 20 years, so I was very, very
14 cautious.

15 Q. Dr. McGarty, I know you mentioned you've been in the
16 courtroom for a number of days.

17 A. I'm sorry?

18 Q. You mentioned you've been in the courtroom for a number
19 of different days throughout the trial; is that correct?

20 A. Yes.

21 Q. And where does the money go that you make in your time
22 working on this matter?

23 A. It -- basically the money for this trial goes to support
24 postdocs. Our current project is bladder cancer. And so I
25 have one in Columbia. I have one I'm bringing on at MIT Koch

1 Cancer Center. I have one coming on most probably from
2 Harvard, the Brigham.

3 MR. ZEBRAK: Thank you, Dr. McGarty.

4 THE WITNESS: Thank you.

5 MR. ZEBRAK: Pass the witness.

6 THE COURT: All right. Redirect?

7 MR. BUCHANAN: Cross, Your Honor.

8 THE COURT: Oh, yes. I'm sorry.

9 MR. BUCHANAN: You've got me on t

10 THE COURT: Yeah.

11 GROSS

CROSS-EXAMINATION

12 BY MR. BUCHANAN:

13 Q. Dr. McGarty.

14 A. Mr. Buchanan.

15 Q. How are you doing?

16 A. I'm fine.

17 Q. Okay. I've just got a few questions. You were talking
18 about Cox's throttling of complaints that come in. So I would
19 like to talk to you a little bit about the plaintiffs.

20 A. About what?

21 Q. I'm sorry, the plaintiffs and their notices that came in.

22 A. Yes.

23 Q. Okay. So you understand that they had a cap that they
24 negotiated with Cox of 600 per day? Do you know that?

25 A. That's correct.

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1 Q. And that they never hit that cap in the entire claims
2 period. Do you know that?

3 A. I don't recall that's --

4 MR. ZEBRAK: Objection, Your Honor. Counsel is
5 testifying.

6 THE COURT: Well, is he -- you can ask him whether
7 he's aware that they ever hit the cap.

8 THE WITNESS: I don't recall right now.

9 BY MR. BUCHANAN:

10 Q. Okay. So you didn't examine that information before you
11 came in to testify?

12 A. I examined them. I believe I was more aware of them back
13 when the deposition was taken. I just have not focused on the
14 MarkMonitor numbers. I was -- my current focus primarily has
15 been from receipt of the notice to actions thereof.

16 Q. So are you aware that, that the plaintiffs had a -- had
17 been provided a one-complaint-per-day cap per subscriber? Are
18 you aware of that, that they could send one notice a day per
19 subscriber?

20 MR. ZEBRAK: Objection.

21 THE COURT: Each company?

22 BY MR. BUCHANAN:

23 Q. Yeah, just from -- the plaintiffs could send through the
24 RIAA, MarkMonitor, one notice per day per complainant.

25 MR. ZEBRAK: Your Honor, there's no foundation for

1 the question. It misstates the evidence.

2 THE COURT: Yeah, that's a confusing one.

3 Do you understand the question?

4 THE WITNESS: Answer the question? Okay.

5 THE COURT: If you understand it.

6 THE WITNESS: I'm sorry?

7 THE COURT: If you understand it.

8 THE WITNESS: I think I did.

9 THE COURT: Okay.

10 THE WITNESS: And if I may rephrase it, Your Honor,
11 perhaps we can clarify it.

12 BY MR. BUCHANAN:

13 Q. Do you know if there was -- if there was a limitation
14 that the CATS system had in Cox on how many notices could come
15 in per subscriber per day for the plaintiffs or anyone else?

16 A. To my, my recollection, Cox would accept one complaint
17 per day per subscriber.

18 Q. Okay. So do you know if the plaintiffs ever hit that cap
19 on a single day during the claims period?

20 A. Exceeded one complaint per day per subscriber?

21 Q. Do you know if they ever did that?

22 A. I'm not aware of that, no.

23 Q. So you talked about the end of the Cox graduated
24 response, the 13 strikes. Do you recall your testimony about
25 that?

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1 A. The back end of the system?

2 Q. Yeah.

3 A. Yes, sir.

4 Q. And then you said it was ambiguous because it said they
5 may terminate?

6 A. The ambiguity that I indicated was the statement that is
7 associated with that 13th step, which is consider to terminate
8 or consider for termination, and just from my personal
9 experience, having done a few companies, I try to avoid
10 ambiguity. So that when you say consider, it's like consider
11 to turn to the starboard. You either turn or you don't turn.

12 So there is an issue here, and Cox, of course, has
13 the control of their policy. I'm not here to tell Cox what to
14 do, but in my experience as an operator, I try to avoid
15 ambiguity, and that phrase to me is ambiguous because the user
16 doesn't know -- how do I consider? What does "consider" mean?
17 At least that's my reading of the term.

18 Q. So you never managed a Copyright Alert System involving
19 copyright notices of infringement, have you?

20 A. My experience in terms of dealing with regulation falls
21 in a wide variety of legal areas but not specifically
22 copyright notification.

23 Q. So did, did -- are you aware that when Cox would send a
24 notice, it would be accompanied with an e-mail that would go
25 to the subscriber in question?

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1 A. I'm aware that one of the procedures meant that if the
2 notice came in, it worked its way through the Cox system, then
3 one of the outputs was an e-mail that would be sent to the
4 user who that notice was directed towards.

5 Q. And so are you aware that subscribers would respond often
6 to those e-mail notices and copyright notices with an e-mail
7 of their own back to Cox?

8 A. I was aware at certain of those steps that the consumer
9 could respond by e-mail.

10 Q. Do you -- did you happen to review any of the 1,700
11 e-mails that have been put into evidence in this case that
12 reflect the responses of subscribers of Cox in response to
13 DMCA notices from the plaintiffs?

14 A. I recall some of the e-mails that were sent back from
15 subscribers to Cox in -- I believe it was in one of the
16 reports that I had reviewed.

17 Q. Okay. So don't you think in a system like this where
18 you're cutting someone's internet service off, that you ought
19 to give them a chance to respond and to consider that
20 response, either in a phone call or an e-mail, and to listen
21 to them, that maybe they have a reason?

22 A. Again, you're asking me to speculate about Cox's policy
23 and what it should be. I can think of various things that I'd
24 like to see, but basically it's fundamentally Cox's decision
25 as to what that should be, not mine to opine on.

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1 Q. Okay. So if Cox has -- and its people there, management
2 and the people on the ground dealing with the calls and the
3 e-mails, have developed a system based on what they see on the
4 ground and what they hear from people, you would -- wouldn't
5 you believe that that would be part of the process, that that
6 should be considered in making a determination when to set a
7 certain point in time where someone should be terminated?

8 A. Again, looking at that as Cox's policy and process, it is
9 a step that I have seen in other similar types of processes
10 where complaints have been remediated in some way, shape, or
11 form. I had that in the cellular world with my customer
12 service report. So in my experience, I've had consumer
13 interaction in remediation efforts underway in various
14 environments. Again, you know, Cox has its policy and
15 procedures. I've had my policy and procedures.

16 MR. BUCHANAN: No further questions.

17 THE WITNESS: Thank you, sir.

18 THE COURT: All right. Redirect?

19 MR. ZEBRAK: No, thank you, Your Honor.

20 THE COURT: Okay. All right, thank you. You're
21 excused at this time. Have a good afternoon.

22 THE WITNESS: Thank you, sir. Thank you, Your
23 Honor.

24 NOTE: The witness stood down.

25 MR. OPPENHEIM: With that, Your Honor, plaintiffs

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1 rest their rebuttal case.

2 THE COURT: All right. All right, that concludes
3 the evidence in the case. We have a couple of matters to talk
4 about, and I'll be able to give you word about whether we're
5 going to try and get in the closing arguments tonight or first
6 thing in the morning and just do part of the, the legal
7 instructions tonight.

8 I understand that some, some of you would like to
9 finish at 5:30, and I think if we try and do the entire
10 closing arguments and the instructions on the law, we're
11 looking at, we're looking at 6:30 or so, so that -- let me
12 finish up what we need to finish up, and then I'll ask Joe to
13 come in and we'll ask you whether you want to just do part of
14 it, as in the legal instructions tonight, and have closings
15 tomorrow, or you want to finish everything tonight.

16 So give us a little chance to finish up a few items,
17 and we'll check back with you shortly. Thank you. You're
18 excused.

19 NOTE: At this point, the jury leaves the courtroom;
20 whereupon, the case continues as follows:

21 JURY OUT

22 THE COURT: All right. Have a seat. I have two
23 issues that I want to raise on the jury instructions. One is
24 whether there's been any evidence, evidence of mitigation that
25 the jury could consider, and second, whether there has been

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1 any evidence that the jury could consider whether to give one
2 statutory damages award for the works that include a song and
3 the music composition.

4 So, Mr. Elkin, tell me, where are you there, sir?

5 MR. ELKIN: Sure. Any particular order?

6 THE COURT: Either one. It doesn't matter.

7 MR. ELKIN: So at sidebar, as Your Honor knows, I
8 took the Court through a proffer of both the sound recording
9 and the music composition --

10 THE COURT: A couple instances of that, yeah.

11 MR. ELKIN: Right, the 504(c)(1).

12 I believe that there is -- the registrations having
13 been provisionally admitted, and there are other documents
14 that reference those registrations as well that have been in
15 evidence, could give the jury with instructions the ability to
16 identify the limitations with respect to the compilations and
17 derivative works.

18 With regard to the sound recording compilation
19 issue, the -- on the face of the certificates are, one can
20 identify the specific, you know, works, and to the extent that
21 they're part of a compilation, I believe that is sufficient
22 evidence clearly that I think under the, the copyright
23 statute, I believe Article IV gives copyright claim, it's the
24 ability to proffer to the U.S. Copyright Office certificates
25 of registration for collective works and additions.

1 Under Section 101, the definition under the
2 copyright statutes, collective works are defined as
3 compilations, and so I think there's an adequate basis for
4 that, and I showed Your Honor an exemplar at sidebar.

5 With respect to the -- and, of course, look, the --
6 examining the evidence, and I don't want to sit here and get
7 in over my skis, but based on the transcripts that we've
8 reviewed, the only evidence that came in, even if one were to
9 consider independent economic value, even if that were
10 something that would be considered in the circumstances, once
11 you have the facial evidence from the certificates of
12 registration, there is nothing that the, that the plaintiffs
13 have come up with other than a couple of very vague lines in
14 Mr. Kooker's testimony with respect to the Sony. I don't
15 think anything could remotely be identified as something that
16 would rise to that level.

17 On the mitigation issue, I would take Your Honor
18 through the following. And this is sort of consistent with
19 the order, I believe, that the Court rendered with regard to
20 the affirmative defenses and specifically with respect to
21 mitigation. I believe what Your Honor had stated in the
22 decision is that there could be evidence that the plaintiffs
23 could have taken actions such as filing of lawsuits against
24 the subscribers that they believed should have been terminated
25 or something that Cox should have done about.

1 I think the following evidence has come into this
2 case: No. 1, there is a basis for the plaintiffs to identify
3 who the subscribers are. MarkMonitor provided the
4 identification by IP protocol address. Ms. Trickey testified
5 that it was the custom and practice of Cox to be able to
6 respond to subpoenas with regard to providing information that
7 had been done repeatedly.

8 We had Mr. Marks and the other representatives of
9 the plaintiffs who testified that they had filed for some
10 period of time literally thousands of lawsuits, including the
11 so-called John Doe lawsuits, where they had issued subpoenas
12 to ISPs to identify specific subscribers, so they had the
13 ability to do that.

14 If you take a look at the -- just by way of interest
15 in terms of the lack of interest that the, that the record
16 companies had, if you take a look at the MOU, they
17 specifically required the ISPs to identify and track the
18 individual subscriber information so that they would be in a
19 position to file lawsuits.

20 The FAQ, which is in evidence, from the Center of
21 Copyright Information, further identified that that
22 information would be culled and provided so that lawsuits can
23 be filed.

24 I asked Mr. Marks on cross-examination whether any
25 lawsuits had been filed, and he said no. We know from

1 Mr. Kokakis's cross-examination that they had abandoned, that
2 is to say, the music industry had abandoned their efforts to
3 go after so-called grandmothers, students, and children, and,
4 of course, Mr. Marks on cross-examination did finally admit
5 that there are PR issues which, you know, prompted them not to
6 do that.

7 Now, I'm not suggesting that they should do that,
8 and I'm not sitting here suggesting that they had the ability
9 or they should have gone after, you know, tens of thousands of
10 subscribers, but one of the issues that I think is important
11 is whether or not they're in a position, as I said in the
12 opening, to go after the worst of the worst.

13 We're not talking about necessarily the kind of
14 scale that would be -- which I personally think would be
15 difficult to argue, but if we're talking about the worst of
16 the worst, the people that they truly believe that Cox should
17 have terminated, could they have in a position to do
18 something? They had the ability to get the information, they
19 did it in the past, they elected not to do it, and I think it
20 squares -- you know, squares within the ambit of what Your
21 Honor permitted in your summary judgment decision.

22 THE COURT: How would, how would the jury in this
23 case with this evidence calculate a reduction in the statutory
24 damages award with what they have?

25 MR. ELKIN: So what they would be able to do, Your

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1 Honor, is to, is to make a decision as to whether the failure
2 to mitigate affects the subscribers who they believe Cox
3 should have, should have terminated or they should have taken
4 action to prevent access to the works, and they may determine
5 that they shouldn't have had any obligation to do that, that
6 they could have just let them stay on, but to the extent that
7 they shouldn't, they could make a determination based on the
8 evidence that they have here.

9 I think statutory damages --

10 THE COURT: This isn't about Cox. This is about
11 plaintiffs' failing to mitigate.

12 MR. ELKIN: Right.

13 THE COURT: Right?

14 MR. ELKIN: So the issue here is could they have
15 taken the actions on their own, realizing the -- how many
16 notices had been sent in respect of the IP addresses. Did
17 they try to file any lawsuits, as they had in the past from
18 2004 to 2009, and filed, you know, these John Doe lawsuits,
19 and try to issue subpoenas? If they really thought that the
20 infringement not only was pervasive on Cox and other networks,
21 they could have done something about it.

22 Mr. Marks testified that, of course, they didn't
23 pursue Time Warner Cable or Cablevision or Comcast or AT&T or,
24 you know, Verizon for the very same reasons.

25 So there's an issue, they're pursuing Cox here for

1 secondary infringement. It's a copyright infringement case,
2 where mitigation, we've argued, as Your Honor knows, should
3 be, should be a defense.

4 We didn't try to put on any other mitigation
5 evidence in the case because we, obviously, abided by Your
6 Honor's dictates. There are other things that we would have
7 liked to have done, but we limited it to the, to the lawsuits
8 issues, and I think a jury can fairly determine in the
9 circumstances whether or not mitigation should, you know,
10 prevent an award or somehow affect, you know, where in the
11 continuum of \$750 to \$30,000 per work or if they find
12 willfulness, up to \$150,000 dollars, an appropriate statutory
13 damages award should lie.

14 THE COURT: All right. Thank you.

15 MR. ELKIN: Thank you, Your Honor.

16 MR. OPPENHEIM: Thank you, Your Honor. If I may,
17 I'll start with mitigation since that's what we were just
18 speaking of.

19 THE COURT: All right.

20 MR. OPPENHEIM: So as I, as I argued yesterday, Your
21 Honor, I still think it remains true that if you -- if
22 defendants' theory of mitigation is right, which is that a
23 plaintiff in a secondary liability case has some obligation to
24 sue the direct infringers, it undoes the notion of secondary
25 liability, because what it says is that there is a -- there is

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1 a thumb on the scale that says you really have to sue the
2 direct infringers, not the secondary infringers, and that's
3 not what the courts have thought.

4 And while Your Honor pointed out yesterday that the
5 Grokster decision didn't directly address a mitigation
6 defense, it's clear that --

7 THE COURT: Well, you've each cited lots of cases
8 and -- on the issue, some secondary liability cases, some --
9 most of them at summary judgment, and we have, I guess, the
10 Bossalina case and some other, but, you know, I was convinced
11 to allow the mitigation instruction in the BMG case to the
12 extent that defendants could show a -- that there was a way
13 for the jury to determine, quantify.

14 MR. OPPENHEIM: I do think it's instructive, Your
15 Honor, to look at your draft instruction on this point,
16 because in the, in the last sentence, you articulate the legal
17 standard to be met.

18 THE COURT: A burden of proving a preponderance of
19 the evidence that failed to use reasonable efforts to mitigate
20 damages; and two, the amount in which the damages would have
21 been mitigated, right?

22 MR. OPPENHEIM: There's zero proof before the jury
23 about that latter issue. I mean, no -- nothing's been
24 presented such that the jury would know what to do with that,
25 the amount of damages that would have been mitigated.

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1 So I think right there, you can say the jury would
2 have no idea what to do with it, but I think more
3 fundamentally, Your Honor, the decision of which tortfeasor to
4 sue is not mitigation. That's the option copyright
5 fundamentally gives to a copyright owner when there are
6 multiple infringers.

7 So I think, I think for that reason, it's wrong.
8 And ultimately, it really does smack of blaming the victim
9 here. You know, the record companies and music publishers
10 should have the option of suing who they want to sue, without
11 having it thrown in their face, oh, you should have sued the
12 other guy, which is, which is what's being claimed here.

13 So Your Honor ruled on summary judgment and, and
14 eliminated two of the three mitigation defenses. We've not
15 objected to the presentation of evidence on the issue. That
16 evidence is before the jury. The jury obviously under the
17 statutory damage factors can consider anything it wants, it
18 can consider that, but a mitigation instruction is a step too
19 far, Your Honor, I believe.

20 THE COURT: Okay.

21 MR. OPPENHEIM: With respect to the, I guess, the
22 first issue you raised, which is the album track issue, I
23 believe -- we had lengthy argument on this morning, and I
24 don't want to repeat that, but I believe that what Your Honor
25 said was that you would conditionally admit it subject to our

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1 submitting something posttrial on it but that the parties were
2 not permitted to use those documents for purposes of the trial
3 with respect to witnesses and in closing.

4 And I think what I understand Mr. Elkin to be saying
5 is now something somewhat contrary, which is, well, the jury
6 can look at this in the back.

7 I don't see how they could do that. It's only been
8 conditionally admitted. Certainly we don't expect them to go
9 through 7,200 different registrations, which we haven't even
10 reviewed yet.

11 So I don't think that there's anything that the jury
12 has presented to them on the registration issue. They do,
13 however, have evidence and testimony repeatedly on these
14 issues that are favorable to the plaintiffs and contrary to
15 the defendants' arguments. Mr. Kokakis testified at some
16 great length about the difference between sound recordings and
17 published works and that they have independent economic value,
18 they have different licensing schemes, different revenues,
19 different owners. He testified at that at some length.

20 We always had experts, such as Mr. Tregillis, who
21 testified that every work in this suit was offered
22 individually on iTunes, showing that they're individually
23 marketed.

24 So the plaintiffs have a record to support the
25 positions that they've taken with respect to these two

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1 copyright issues. The defendants could have presented
2 evidence on it. They chose not to. I don't believe giving an
3 instruction to the jury on those issues right now will leave
4 the jury with any sense what to do with them because they have
5 nothing in front of them to understand what they mean.

6 THE COURT: All right. Mr. Elkin?

7 MR. ELKIN: Thank you, Your Honor. I'll be brief.
8 There was a reference to last night's charging conference, and
9 I think Mr. Oppenheim just doubled down on this notion of
10 joint tortfeasors. This is not a situation where Cox and the
11 subscribers are jointly being pursued for direct infringement.
12 There's a different standard for secondary infringement.

13 It then -- what the standard is for direct
14 infringement, I'm not going to -- Your Honor knows the
15 additional requirements, so he's really comparing apples to
16 oranges.

17 I don't want to repeat and rehash the same
18 arguments. I think you have it. I just -- I do think in the
19 circumstances, we did not question Mr. Tregillis on the issues
20 about which you instructed us not to. The notion that somehow
21 his testimony could be used against us when we were precluded
22 from producing the information is ironic, but I just harken
23 back to the argument that I made with regard to the
24 certificates. I didn't think that Your Honor had precluded
25 the certificates to be a bar to -- for us to pursue this. It

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1 had to do more with the bar to using it in the case, and we
2 declined, of course, and pursuant to Your Honor's order, did
3 not even go there.

4 THE COURT: Well, I make rulings on individual
5 pieces of evidence, and you-all map out how you want to put
6 your case on, what witnesses you want to put in, and what
7 testimony you believe is appropriate and admissible, and then
8 I look at the end of the case to see what's there and what's
9 not there, and so I -- and when you have experts testifying,
10 as I've demonstrated, I think they should be held to the
11 confines of their reports. They get, you know, rebuttal
12 reports. They get beginning reports, rebuttal, surrebuttal
13 reports. There shouldn't be any surprises. So the
14 limitations I've imposed on expert testimony is based on, on
15 the notice requirements under Rule 26.

16 And the registrations, obviously, we looked at them
17 at the issue when it was, when it was initially offered on
18 summary judgment and ownership and registration issues, and
19 then it comes up again yesterday with these 7,200, which
20 there's just no testimony as to what's in that pile.

21 And so to now somehow expect the jury to pluck out
22 the works that are both sound recordings and music
23 compositions or allow you to, I guess, in closing arguments
24 just say, listen, there's 4,000 of these or 3,000 of these are
25 both one and the other, that, I think, is improper.

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1 I expected that there would be testimony about how
2 many of these sound recordings were also music compositions,
3 and the jury would be -- would have that evidence through the
4 witness stand when they were deliberating.

5 I mean, it's a close issue even to begin with as to
6 whether in this day and age, when the courts have clearly been
7 looking at the independent value of the works versus whether
8 they're music compositions and sound recordings, and I'm not
9 sure that Mr. Oppenheim isn't correct that we shouldn't even
10 be looking at the traditional Second Circuit analysis that
11 you've cited and is one of the governing cases, but I just
12 don't see that there's evidence from which they could collect
13 and cull and determine whether they wanted to combine the
14 statutory damages award for those works that are -- contained
15 both sound recordings and music compositions.

16 So I'm going to find that they should be allowed to
17 deliberate on the 10,017 individual works, regardless of
18 whether they're compositions or sound recordings, and your
19 exception, of course, is noted.

20 The other issue on mitigation, you know, I didn't
21 know how that would go in the course of the trial, but, you
22 know, clearly we had the instruction that I gave in BMG
23 talking about the -- that the mitigation instruction included
24 both that plaintiffs had failed to use reasonable efforts to
25 mitigate damages and also that the amount by which damages

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1 would have been mitigated, and there's absolutely an absence
2 of any evidentiary testimony about, you know, how they would
3 look at that.

4 I mean, the worst of the worst -- that's no standard
5 from which they could say, okay, there is -- and there's no
6 testimony about who are the worst of the worst. I mean, there
7 are a couple of isolated occasions where there were a hundred
8 or more or a thousand for business customers where the
9 testimony was about, but that's not a standard that they could
10 look at and reasonably deliberate on, on where's that line
11 drawn.

12 So I'm not going to give the mitigation instruction,
13 either, and again, your exception is noted. I don't find that
14 the evidence -- you know, there is the Trickey testimony.
15 There was the John Doe lawsuits, and so that evidence is out
16 there, but when you compare that to what the jury would be
17 asked to deliberate, and I think that mitigation instruction
18 is the correct instruction to give to the jury, I find that
19 none of that evidence weighs on those issues.

20 So again, your exception is noted.

21 MR. ELKIN: I understand, Your Honor. May I just
22 clarify two issues on Your Honor's last ruling?

23 THE COURT: Yes, sir.

24 MR. ELKIN: One is with regard to the mitigation,
25 just to be clear, I don't know this is going to alter Your

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1 Honor's decision or consideration of it, but when we submitted
2 our original jury instruction, it wasn't quite formulated
3 squarely with regard to damages we found.

4 THE COURT: Okay. Just a bar to an award.

5 MR. ELKIN: Well, some or all, and we took that from
6 Fourth Circuit precedent. So we -- some of what Your Honor
7 identified at a high level sort of informed us with regard to
8 the instruction.

9 So I'm not unmindful of your admonition there, but I
10 just want to be clear with regard to statutory damages,
11 this -- I assume that like all copyright infringement cases
12 where juries consider factors, they are entitled to consider a
13 variety of factors, including mitigation. I think that's
14 always been one of the factors that juries can consider.
15 That's consistent with what I understand Mr. Oppenheim
16 identified, and I don't think that's cutting new ground here,
17 but I just want to make sure that, that I haven't missed
18 anything.

19 THE COURT: So the question is are you allowed to
20 still argue that Sony took -- and the music industry took
21 different tacks and they could have continued to pursue suits
22 against subscribers and they did not do that and you should
23 consider that in the statutory damages award?

24 MR. ELKIN: Right. Not as an affirmative defense.

25 THE COURT: Right.

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1 MR. ELKIN: Not as an affirmative defense, but in
2 their consideration of statutory damages, they're going to
3 argue, you know, whatever they're going to argue with regard
4 to those factors. But even given Your Honor's ruling on the
5 defense, I think as a defendant looking at this potential
6 exposure, to not be able to present whatever record evidence
7 there is for them to consider, where on the continuum the
8 statutory damages award should lie, that we shouldn't be
9 handcuffed on that.

10 THE COURT: I don't think you should be barred from
11 identifying the evidence in the trial and fashion it as, you
12 know, that they could have and did make different decisions
13 earlier on and that they stopped because in part it was a
14 public relations disaster and that they should consider that.

15 MR. ELKIN: Thank you, Your Honor.

16 THE COURT: All right.

17 All right. How do you want to -- so we can turn the
18 jury instructions around quickly and the verdict form is
19 ready.

20 Joe, ask them -- so I've got a half an hour of
21 instructions probably, which would take us until, to 4:30, and
22 for them to get the case tonight, they would have to agree to
23 stay between 6:30 and probably 6:45. So would you go ask them
24 whether they're willing to do that?

25 THE COURT SECURITY OFFICER: One of the jurors has

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1 to be at a function at seven today.

2 THE COURT: Okay. All right. Well, unless it's
3 next door at the Hyatt, I guess we're not going to do
4 closings, and I won't force parties to break the closings in
5 part.

6 So we're going to take a recess, I'll get final
7 instructions and a copy of the verdict form, and we'll -- I'll
8 just charge the jury tonight, and then we'll let them go.

9 Have you got issues?

10 MR. OPPENHEIM: I just -- to preserve rights, Your
11 Honor, and as you take the jury instructions back, I believe
12 in instruction No. 10, the second paragraph can probably be
13 removed out with respect to affirmative defenses.

14 Sorry, I'll -- and then we just want to reserve our
15 rights, Your Honor, with respect to --

16 THE COURT: You've already preserved your rights on
17 the other ones.

18 MR. OPPENHEIM: Okay. That's fine.

19 THE COURT: Which ones do you think need to be
20 modified?

21 MR. OPPENHEIM: I believe that's --

22 THE COURT: I didn't hear what you said from over
23 there.

24 MR. OPPENHEIM: I'm sorry. In instruction No. 10,
25 Your Honor --

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1 THE COURT: 10.

2 MR. OPPENHEIM: -- I think the second paragraph now
3 is obsolete and unnecessary because there is no affirmative
4 defense.

5 THE COURT: Okay. All right.

6 MR. EATON: Your Honor, he's correct.

7 THE COURT: Okay. All right. Thank you.

8 Anything else?

9 MR. OPPENHEIM: No, just the other changes which
10 Your Honor has already gone through.

11 THE COURT: Meaning the -- pulling the mitigation
12 instruction?

13 MR. OPPENHEIM: Yes, Your Honor.

14 THE COURT: Okay. And then not modifying the fact
15 that there are 10,017 works at issue.

16 MR. OPPENHEIM: Correct, Your Honor.

17 THE COURT: All right. We'll make those changes.
18 We'll get you out a final copy, and we'll come back and charge
19 the jury, and we'll -- I'll try and get you the verdict form
20 as well, but if, if you have problems with the verdict form,
21 we can continue to talk about that. That doesn't have to go
22 back right away.

23 All right. We're going to take a brief recess.

24 Let's take 15 minutes.

25 NOTE: At this point, a recess is taken; at the

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1 conclusion of which the case continues in the absence of the
2 jury as follow:

3 JURY OUT

4 THE COURT: All right. Any final comments before I
5 charge the jury?

6 MR. OPPENHEIM: The jury instructions look good to
7 plaintiffs, Your Honor.

8 We have a suggestion on the verdict form, but we can
9 deal with that after we charge the jury and let them go.

10 THE COURT: Okay. That's fine.

11 All right. Then, Joe, let's get our jury, please.

12 MR. EATON: Your Honor, just from our point of view,
13 we agree about the verdict form, that won't be hard to fix.

14 We are fine with the jury instructions.

15 And at the risk of being belts and braces, I just
16 want to make sure we have fully preserved all of our
17 objections.

18 THE COURT: Certainly, you are preserved.

19 MR. EATON: Thank you, sir.

20 MR. OPPENHEIM: And similarly plaintiffs.

21 THE COURT: Yeah, similarly plaintiffs.

22 Yes, sir, now we're ready, Joe.

23 If you kind of head towards the podium, Mr. Eaton --
24 Mr. Eaton, if you head towards the podium, then I understand
25 there's something that you want to -- want say. And I look

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1 around and my signal is that somebody is heading towards the
2 podium.

3 MR. EATON: Sorry. Understood.

4 THE COURT: No, that's all right.

5 NOTE: At this point the jury returns to the
6 courtroom; whereupon the case continues as follows:

7 JURY IN

8 THE COURT: All right, please have a seat.

9 So this will take a little awhile. And I don't do
10 this for a living, fortunately.

11 So I'll read the instructions to you. The good news
12 is you'll have copies of the instructions when you are
13 deliberating, we'll send several copies back for you to refer
14 to if you need it. But I appreciate you trying to listen
15 while I go through them tonight.

16 And then, as you know, we're going to excuse you for
17 the evening and then come back and have closing arguments in
18 the morning.

19 Does 9 o'clock work for you all in the morning?
20 Okay, then we'll plan on coming back at 9 a.m. for closing
21 arguments, and then you'll get the case for deliberation.

22 All right. Now that you've heard the evidence in
23 the case, it's my duty to instruct you on the applicable law.
24 It is your duty to follow the law as I state it. You must
25 apply the law to the facts as you find them from the evidence

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1 in the case. Do not single out one instruction as stating the
2 law, but consider the instructions as a whole. Do not be
3 concerned about the wisdom of any rule of law. You must
4 follow and apply the law.

5 The lawyers may refer to some of the governing rules
6 of law in their arguments. If there is any difference between
7 the law as stated by me versus by the lawyers, you must follow
8 these instructions.

9 Nothing I say in these instructions indicates that I
10 have an opinion about the facts of the case. You're not --
11 you, not I, have the duty to determine the facts.

12 You must perform your duties as jurors without bias
13 or prejudice as to any party. The law does not permit you to
14 be controlled by sympathy, prejudice, or public opinion. All
15 parties expect that you will carefully and impartially
16 consider all the evidence, follow the law as it is now being
17 given to you, and reach a just verdict regardless of the
18 consequences.

19 Unless you're otherwise instructed, the evidence in
20 the case consists of the sworn testimony of the witnesses,
21 including deposition testimony, regardless of who called the
22 witness, all exhibits received in evidence regardless of who
23 may have produced them, and all facts and events that may have
24 been admitted to or stipulated to.

25 Statements and arguments by the lawyers are not

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1 evidence. The lawyers are not witnesses. What they have said
2 in their opening statements or what they will say in closing
3 arguments and at other times is intended to help you
4 understand the evidence, but it's not the evidence. However,
5 when the lawyers on both sides stipulate or agree on the
6 existence of a fact, unless otherwise instructed, you must
7 accept the stipulation and regard that fact as proved.

8 If I have taken judicial notice of a fact or
9 instructed you that certain facts have already been
10 established, you must accept it as true.

11 Any evidence to which I have sustained an objection
12 and evidence that I have ordered stricken must be entirely
13 disregarded.

14 If a lawyer asks a witness a question that contains
15 an assertion of fact, you may not consider the assertion as
16 evidence of the fact. The lawyer's questions and statements
17 are not evidence.

18 During the trial I may sometimes ask a witness
19 questions. Please do not think I have any opinion about the
20 subject matter of my questions. I may ask a question simply
21 to clarify a matter, not to help one side of the case or harm
22 the other side.

23 Remember at all times that you as the jurors are the
24 sole judges of the facts in the case.

25 It's my duty to caution or warn an attorney who does

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1 something I believe is not in keeping with the rules of
2 evidence or procedure. You are not to draw any inference
3 against the side I may caution or warn during the trial.

4 Testimony exhibits -- and exhibits may be admitted
5 into evidence during the trial only if they meet certain
6 criteria or standards. It's the lawyer's duty to object when
7 the other side offers testimony or an exhibit that a lawyer
8 believes is not properly admissible under the rules of law.
9 Only by offering an objection can a lawyer request and obtain
10 a ruling from me on the admissibility of the evidence being
11 offered by the other side. You should not be influenced
12 against any lawyer or the client because the lawyer has made
13 objections.

14 Do not attempt to interpret my rulings on objections
15 as somehow indicating how I think you should decide the case.
16 I'm simply making a ruling on a legal question.

17 There's nothing particularly different in the way
18 that a juror should consider the evidence in a trial from that
19 which any reasonable and careful person would deal with any
20 very important question that must be resolved by examining
21 facts, opinions, and evidence. You are expected to use your
22 good sense in considering and evaluating the evidence in the
23 case. Use the evidence only for those purposes for which it
24 has been received, and give the evidence a reasonable and fair
25 construction in the light of your common knowledge of the

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1 natural tendencies and inclinations of human beings.

2 If any reference by the Court or by counsel to
3 matters of testimony or exhibits does not coincide with your
4 own recollection of that evidence, it's your recollection
5 which should control during your deliberations and not the
6 statements of the Court or of counsel.

7 As I said, you're the judges of the evidence
8 received in the case.

9 Sometimes evidence may be admitted for a particular
10 purpose and not generally for all purposes. You may recall
11 that during the course of this trial I instructed you that
12 I've admitted certain evidence for a limited purpose. You
13 must consider this evidence only for the limited purpose for
14 which it was admitted.

15 Plaintiffs have the burden of proving their case by
16 what's called the preponderance of the evidence. That means
17 plaintiffs have to prove to you, in light of all the evidence,
18 that what they claim is more likely so than not so.

19 To say it differently, if you were to put the
20 evidence favorable to plaintiffs and the evidence favorable to
21 defendants on opposite sides of the scale, plaintiffs would
22 have to make the scales tip somewhat on their side.

23 If you find after considering all the evidence that
24 a claim or fact is more likely so than not so, then the claim
25 or fact has been proved by a preponderance of the evidence.

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1 This standard does not require proof of an absolute certainty
2 since proof of an absolute certainty is seldom possible in any
3 case.

4 In determining whether any fact in issue has been
5 proved by a preponderance of the evidence, unless otherwise
6 instructed, you may consider the testimony of all witnesses
7 regardless of who may have called them, all exhibits received
8 in evidence regardless of who may have produced them.

9 You may have heard of the term "proof beyond a
10 reasonable doubt." That's a stricter standard applicable in
11 criminal cases. It does not apply in civil cases such as
12 this. And you should, therefore, not consider it.

13 Generally speaking, there are two types of evidence
14 presented during a trial, direct and circumstantial evidence.
15 Direct evidence is proof that does not require an inference,
16 such as testimony of someone who claims to have personal
17 knowledge of a fact.

18 Circumstantial evidence is proof of a fact or a
19 series of facts that tends to show that some other fact is
20 true.

21 As an example, direct evidence that it is raining is
22 testimony from a witness who says, I was outside a minute ago
23 and I saw it raining.

24 Circumstantial evidence that it is raining is the
25 observation of someone entering a room carrying a wet

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1 umbrella.

2 The law makes no distinction between the weight or
3 value to be given to either direct or circumstantial evidence.
4 A greater degree of certainty is not required of
5 circumstantial evidence.

6 In reaching your verdict, you should consider all
7 the evidence in the case, including both direct and
8 circumstantial evidence.

9 You are to consider only the evidence in the case.
10 However, you are not limited to the statements of the
11 witnesses. You may draw from the facts you find that have
12 been proved such reasonable inferences as seemed -- as seem
13 justified in light of your experience.

14 Inferences are deductions or conclusions that reason
15 and common sense lead you to draw from facts established by
16 the evidence in the case.

17 You are the sole judges of the credibility of the
18 witnesses and the weight that their testimony deserves. You
19 may be guided by the appearance and conduct of a witness, or
20 by the manner in which a witness testifies, or by the
21 character of the testimony given, or by evidence contrary to
22 the testimony.

23 You should carefully examine all the testimony
24 given, the circumstances under which each witness has
25 testified, and every matter in evidence tending to show

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1 whether a witness is worthy of belief. Consider each witness'
2 intelligence, motive and state of mind, and demeanor or manner
3 while testifying.

4 Consider the witness' ability to observe the matters
5 to which the witness has testified, and whether the witness
6 impresses you as having an accurate recollection of these
7 matters. Also, consider any relation each witness may have
8 with either side of the case, the manner in which each witness
9 might be affected by the verdict, and the extent to which the
10 testimony of each witness is either supported or contradicted
11 by other evidence in the case.

12 Inconsistencies or discrepancies in the testimony of
13 a witness or between the testimony of different witnesses may
14 or may not cause you to discredit such testimony. Two or more
15 witnesses -- persons seeing an event may see or hear it
16 differently.

17 In weighing the effect of a discrepancy, always
18 consider whether it pertains to a matter of importance or an
19 unimportant detail, and whether the discrepancy results from
20 innocent error or intentional falsehood.

21 After making your own judgment, you'll give the
22 testimony of each witness such weight, if any, that you think
23 deserves. In short, you may accept or reject the testimony of
24 any witness in whole or in part.

25 In addition, the weight of the evidence is not

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1 necessarily determined by the number of witnesses testifying
2 to the existence or non-existence of any fact. You may find
3 that the testimony of a small number of witnesses as to any
4 fact is more credible than the testimony of a larger number of
5 witnesses to the contrary.

6 A witness may be discredited or impeached by
7 contradictory evidence or by evidence that at some other time
8 the witness said or did -- or has said or done something, or
9 has failed to say or do something that is inconsistent with
10 the witness' present testimony.

11 If you believe any witness has been impeached and
12 thus discredited, you may give the testimony of that witness
13 such credibility, if any, you think it deserves.

14 If a witness is shown knowingly to have testified
15 falsely about any material matter, you have a right to
16 distrust such witness' other testimony, and you may reject all
17 the testimony of that witness or give it such credibility as
18 you think it deserves.

19 An act or omission is knowingly done if the act is
20 done voluntarily and intentionally, and not because of mistake
21 or accident or innocent reason.

22 The rules of evidence ordinarily do not permit
23 witnesses to testify as to opinions or conclusions. There is
24 an exception to this rule for expert witnesses.

25 An expert witness is a person who by education and

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1 experience has become expert in some art, science, profession,
2 or calling. Expert witnesses may state their opinions as to
3 matters in which they profess to be expert, and may also state
4 their reasons for their opinions.

5 You should consider each expert opinion received in
6 evidence in this case and give it such weight as you think it
7 deserves. If you should decide the opinion of an expert
8 witness is not based on sufficient education and experience,
9 or if you should conclude that the reasons given in support of
10 the opinion are not sound, or if you feel the expert's opinion
11 is outweighed by other evidence, you may disregard the opinion
12 entirely.

13 During the trial certain testimony has been
14 presented by way of deposition. The deposition consisted of
15 sworn, recorded answers to questions asked of the witnesses in
16 advance of the trial by attorneys for the parties in the case.
17 The testimony of a witness who, for some reason, is not
18 present to testify from the witness stand may be presented in
19 writing under oath or on a videotape. Such testimony is
20 entitled to the same consideration and is to be judged as to
21 credibility, weighed, and otherwise considered by you, insofar
22 as possible, in the same way as if the witness had been
23 present and had testified from the witness stand.

24 Each party has introduced into evidence certain
25 interrogatories; that is, questions together with answers,

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1 signed and sworn to by another party. A party is bound by its
2 sworn answers.

3 By introducing an opposing party's answers to
4 interrogatories, the introducing party does not bind itself to
5 these answers. The introducing party may challenge the
6 opposing parties' answers in whole or in part or may offer
7 contrary evidence.

8 As I stated in my initial instructions at the
9 beginning of the case, you have heard testimony now and seen
10 documents that refer to the Digital Millennium Copyright Act,
11 known as the DMCA. The DMCA provides that an internet service
12 provider, like Cox, may have a defense to liability arising
13 from infringement on its network and that there is a defense
14 called a safe harbor defense, which is included in the DMCA in
15 part of that statute. It's not a defense for Cox in this
16 case.

17 However, the fact that the safe harbor provision
18 does not apply does not bear adversely on the consideration of
19 a defense by Cox that Cox's conduct is not infringing under
20 the Copyright Act or any other defense.

21 I will be sending the exhibits that have been
22 received in evidence during the trial back to you, and you
23 will have them while you deliberate.

24 A copyright is a set of rights granted by federal
25 law to the owner of an original work of authorship. The owner

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1 of a copyright has the exclusive right to: One, reproduce the
2 copyrighted work.

3 Two, prepare derivative works based upon the
4 copyrighted work.

5 Three, distribute copies or phone records --
6 phonorecords of the copyrighted -- to the public by sale or
7 other transfer of ownership or by rental, lease, or lending.

8 Four, perform publicly a copyrighted literary work,
9 musical work, dramatic work, choreographic work, pantomime
10 work, or motion picture.

11 Five, display publicly a copyrighted literary work,
12 music work, dramatic work, choreographic work, pantomime work,
13 pictorial work, graphic work, sculptural work, or the
14 individual images of a motion picture.

15 The term "owner" includes the author of the work, an
16 assignee, and an exclusive licensee.

17 This case involves two kinds of copyrighted works:
18 Sound recordings, i.e., recorded music, and musical
19 compositions, which include music and lyrics.

20 In this case, plaintiffs contend that Cox is
21 contributorily and vicariously liable for the infringement of
22 plaintiffs' 10,017 copyrighted works by users of Cox's
23 internet service.

24 Plaintiffs have already established that they are
25 the owners of the 10,017 copyrighted works as issue -- at

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1 issue in this case, and that the copyright and registration in
2 each of these 10,017 works is valid.

3 Plaintiffs have also established the knowledge
4 element of their contributory infringement claim. That is,
5 plaintiffs have established that Cox had specific enough
6 knowledge of the infringement occurring on its network that
7 Cox could have done something about it.

8 In order to prove contributory or vicarious
9 copyright infringement, plaintiffs must first establish by a
10 preponderance of the evidence that users of Cox's internet
11 service used that service to infringe plaintiffs' copyrighted
12 works.

13 Plaintiffs are not required to prove the specific
14 identities of the infringing users.

15 A copyright owner's exclusive right to distribute,
16 reproduce, and copy its copyrighted work is infringed by the
17 downloading or uploading of the copyrighted work without
18 authorization.

19 If you find that users of Cox's internet service
20 uploaded or downloaded all or part of plaintiffs' copyrighted
21 works at issue without authorization, then plaintiffs have
22 established that the users of Cox's internet service have
23 infringed plaintiffs' copyrighted works.

24 A copyright may be infringed by contributory
25 infringing. With certain exceptions, a person is liable for

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1 copyright infringement by another if the person knows or was
2 willfully blind to the infringing activity and induces,
3 causes, or materially contributes to the activity.

4 Plaintiff has the burden of proving each of the
5 following by a preponderance of the evidence: First, that
6 there was direct infringement of plaintiffs' copyrighted works
7 at issue by users of Cox's internet service.

8 Second, that Cox knew of specific instances of
9 infringement or was willfully blind to such instances.

10 And, third, that Cox induced, caused, or materially
11 contributed to the infringing activity.

12 The second element, that Cox knew of the specific
13 instances of infringement, has already been established. As
14 such, there is no need to consider this knowledge element in
15 your deliberations.

16 A copyright may also be infringed by vicariously
17 infringing. A person is liable for copyright infringement by
18 another if the person has a financial interest and the right
19 and ability to supervise the infringing activity, whether or
20 not the person knew of the infringement.

21 In order to prove vicarious copyright infringement,
22 plaintiffs have the burden of proving each of the following by
23 a preponderance of the evidence: First, that there was direct
24 infringement of plaintiffs' copyrighted works by users of
25 Cox's internet service.

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1 Second, that Cox had a direct financial interest in
2 the infringing activity of its users.

3 And, third, that Cox had the right and ability to
4 supervise such infringing activity.

5 The fact that I'm instructing you on the proper
6 measure of damages should not be considered as indicating any
7 view of mine as to which party is entitled to your verdict in
8 the case. Instructions as to the measure of damages are given
9 for your guidance only in the event you should find in favor
10 of the plaintiffs from a preponderance of the evidence in the
11 case in accordance with the other instructions.

12 If you find that Cox is liable for contributory
13 infringement or you find Cox is liable for vicarious
14 infringement, then you should consider the amount of money to
15 award the plaintiffs.

16 If you find that Cox is neither liable for
17 contributory or vicarious infringement, then you should not
18 consider this issue.

19 Plaintiffs seek an award of statutory damages under
20 the United States Copyright Act. Statutory damages are
21 damages that are established by Congress in the Copyright Act
22 because actual damages in copyright cases are often difficult
23 to establish with precision. The purposes are to compensate
24 the copyright owner, penalize the infringer, and deter future
25 copyright law violations.

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1 The amount awarded must be between 750 and \$30,000
2 for each copyrighted work that you find to be infringed.

3 If plaintiffs prove that Cox acted willfully in
4 contributorily or vicariously infringing plaintiffs'
5 copyrights, you may, but are not required to, increase the
6 statutory damage award to a sum as high as \$150,000 per
7 copyrighted work.

8 You should award as statutory damages an amount that
9 you find to be fair under the circumstances. In determining
10 the appropriate amount to award, you may consider the
11 following factors: The profits Cox earned because of the
12 infringement.

13 The expenses Cox saved because of the infringement.

14 The revenues that plaintiffs lost because of the
15 infringement.

16 The difficulty of proving plaintiffs' actual
17 damages.

18 The circumstances of the infringement.

19 Whether Cox acted willfully or intentionally in
20 contributorily or vicariously infringing plaintiffs'
21 copyrights.

22 Deterrence of future infringement.

23 In the case of willfulness, the need to punish Cox.

24 In considering what amount would have a deterrent
25 effect, you may consider Cox's total profits and the effect

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1 the award may have on Cox in the marketplace.

2 Plaintiffs are not required to prove any actual
3 damage suffered by plaintiffs to be awarded statutory damages.
4 You should award statutory damages whether or not there is
5 evidence of the actual damage suffered by plaintiffs, and your
6 statutory damage award need not be based on the actual damages
7 suffered by plaintiffs.

8 Cox's contributory or vicarious infringement is
9 considered willful if plaintiffs prove by a preponderance of
10 the evidence that Cox had knowledge that its subscribers'
11 actions constituted infringement of plaintiffs' copyrights,
12 acted with reckless disregard for the infringement of
13 plaintiffs' copyrights, or was willfully blind to the
14 infringement of plaintiffs' copyrights.

15 You must follow these rules while deliberating and
16 returning your verdict. First, when you go to the jury room,
17 you must select a foreperson. The foreperson will preside
18 over your discussions and speak for you here in court.

19 Second, it's your duty as jurors to discuss this
20 case with one another in the jury and try to reach an
21 agreement. Each of you must make your own conscious decision,
22 but only after you have considered all the evidence, discussed
23 it fully with the other jurors, and listened to the views of
24 the other jurors.

25 Do not be afraid to change your opinions if the

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1 discussion persuades you that you should. But do not make a
2 decision simply because other jurors think it's right or
3 simply to reach a verdict.

4 Remember at all times that you are judges of the
5 facts. Your sole interest is to seek the truth from the
6 evidence in the case.

7 Third, if you need to communicate with me during
8 deliberations, you may send a note to me through the --
9 through Joe, and signed by one or more of the jurors. I will
10 respond as soon as possible, either in writing or orally by
11 having you all come back into open court.

12 Remember, you should not tell anyone, including me,
13 how your votes stand numerically.

14 Fourth, your verdict must be based solely on the
15 evidence and the law that I have given you in these
16 instructions. The verdict must be unanimous. Nothing I have
17 said or done is intended to suggest what your verdict should
18 be, that's entirely for you to decide.

19 Finally, we will have a verdict form that is the
20 written notice of the decision you reach. The form will have
21 a place for you to indicate "yes" or "no" whether plaintiffs
22 have proven either vicarious or contributory infringement by a
23 preponderance of the evidence. And, you know, either check
24 the "yes" or the "no" box. And then there will be a box for
25 willfulness. And then there will be a box for damages. And

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1 then the form must be dated and signed by the foreperson.

2 When you have reached a verdict, you will let Mr.
3 Ruelas know. And then when you are ready, we will bring you
4 back into court and return the verdict in the courtroom.

5 Okay. That completes the instructions. And so, I
6 am going to release you now for the evening. And remember,
7 the same rule applies, no investigation, no research, no
8 talking to anybody about the case.

9 And enjoy the evening, and we'll see you back here
10 at 9 o'clock tomorrow morning for closing arguments.

11 All right. Thank you, you are excused.

12 NOTE: At this point the jury leaves the courtroom;
13 whereupon the case continues as follows:

14 JURY OUT

15 THE COURT: All right. Suggested modification to
16 the verdict form?

17 MR. OPPENHEIM: This truly qualifies as minor, Your
18 Honor, but I just want to make sure that whatever form we
19 submit to the jury is as simple as possible.

20 After question 3, as you turn the page, the first
21 italicized comment there: If you answered "no" to both
22 questions 1 and 2, do not answer any more questions.

23 I think that probably should go between 2 and 3, and
24 may eliminate the need in 3 for where we say: If you answered
25 yes to question 1 or 2 ...

1 Just as a matter of simplicity.

2 MR. EATON: You mean about the latter point. But I
3 think that's correct, Your Honor. I think that -- I think
4 that would be a good fix.

5 THE COURT: Yeah, I definitely think we should put
6 the sentence at the top of page 2 after number 2.

7 And you don't want the redundancy in question 3,
8 just eliminate that?

9 MR. OPPENHEIM: Yeah. I don't think we need it,
10 Your Honor, anymore if we move that up.

11 THE COURT: So we should say: Plaintiffs have
12 asserted infringement claims for 10,017 works. How many works
13 -- how many of the works did Cox vicariously and
14 contributorily infringe?

15 MR. OPPENHEIM: I think that works, Your Honor.

16 MR. EATON: Your Honor, could you -- I couldn't hear
17 that. Forgive me. Could you repeat what you just --

18 THE COURT: So if we take out the, "If you answered
19 yes to question 1 or 2," then all that's left is: Plaintiffs
20 have asserted infringement of 10,017 works.

21 MR. EATON: Yeah, you're right.

22 THE COURT: How many of the works did Cox
23 vicariously or contributorily infringe?

24 MR. EATON: That's true. I think that's the correct
25 way to do it, Your Honor.

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1 THE COURT: Okay. I'm happy to make those changes.

2 All right. Anything else tonight then?

3 MR. OPPENHEIM: One moment, Your Honor.

4 I think we're fine, Your Honor, with the changes you
5 suggested. I think it will be fine.

6 THE COURT: Okay.

7 MR. ELKIN: Nothing here, Your Honor.

8 THE COURT: All right, thank you.

9 All right, then we're --

10 MR. GOULD: Your Honor, if I could just ask, could
11 you maybe e-mail it to us tonight so we could look at it fresh
12 with the changes?

13 THE COURT: They're so dramatic, I know you're going
14 to spend at least an hour looking at it carefully. We'll be
15 happy to do that.

16 MR. GOULD: Thank you, sir.

17 MR. ZEBRAK: We promise not to pass any notes.

18 THE COURT: Okay. Then we'll see you all at
19 9 o'clock tomorrow morning.

20 We're in recess.

21 NOTE: The December 17, 2019, portion of the case is
22 concluded.

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2 CERTIFICATE OF COURT REPORTERS

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4 We certify that the foregoing is a true and
5 accurate transcription of our stenographic notes.

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7 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

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9 /s/ Anneliese J. Thomson
10 Anneliese J. Thomson, RDR, CRR

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